No. 92-6073-CFX Title: Richard Lyle Austin, Petitioner
Status: GRANTED v.
United States

Docketed: Court: United States Court of Appeals for
September 30, 1992 the Eighth Circuit

Counsel for petitioner: Johnson,Richard L.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 30 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Nov 24 1992		Order extending time to file response to petition until December 28, 1992.
6	Dec 28 1992		Brief of respondent United States in opposition filed.
5	Dec 30 1992		DISTRIBUTED. January 15, 1993
8	Jan 15 1993		Petition GRANTED. The brief of the petitioner must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., March 1, 1993. The brief of the respondent must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., March 31, 1993. A reply brief, if any, must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., April 12, 1993. Rule 29 does not apply. The case is set for oral argument during the Session beginning April 19, 1993.
			**********
9	Feb 12 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Eighth Circuit.
10	Feb 16 1993		Record filed.
		*	Certified proceedings United States District Court for the District of South Dakota.
11	Feb 26 1993		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
12	Mar 1 1993		Brief of petitioner Richard Lyle Austin filed.
13	Mar 1 1993		Brief amicus curiae of American Civil Liberties Union filed.
15	Mar 1 1993		Joint appendix filed.
22	Mar 1 1993		Brief amicus curiae of SMHS filed.
14	Mar 5 1993		SET FOR ARGUMENT TUESDAY, APRIL 20,1993. (3RD CASE).
16	Mar 10 1993		CIRCULATED.
17	Mar 29 1993	X	Brief amici curiae of Arizona, et al. filed.
18	Mar 30 1993	X	Brief of respondent United States filed.
19	Mar 31 1993	X	Brief amici curiae of American Alliance for Rights and Responsibilities, et al. filed.
20	Apr 9 1993	X	Reply brief of petitioner filed.
21	Apr 20 1993		ARGUED.

No. 92-6073

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ONE PARCEL OF PROPERTY LOCATED AT 508 DEPOT STREET, GARRETSON, MINNEHAHA COUNTY, SOUTH DAKOTA, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, and ONE 1972 HMET MOBILE HOME WITH SERIAL NUMBER 0356509G, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,

Petitioners.

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

Richard L. Johnson
Attorney for Petitioners
101 South Main Avenue, Suite 305
Sioux Falls, South Dakota 57102
Phone (605) 338-2626

IN THE SUPREME COURT OF

THE UNITED STATES

No. 92-6073

ORIGINAL

ONE PARCEL OF PROPERTY LOCATED AT 508 DEPOT STREET, GARRETSON, MINNEHAHA COUNTY, SOUTH DAKOTA, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, and ONE 1972 HMET MOBILE HOME WITH SERIAL NUMBER 0356509G, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,

Petitioners.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Comes now Richard Lyle Austin, Petitioner herein, by and through his attorney, Richard L. Johnson, and for his Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit represents and shows to this Court the following:

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE CONCEPT OF PROPORTIONALITY ARISING FROM THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION SHOULD BE APPLIED TO THE FORFEITURE OF THE ABOVE-DESCRIBED PROPERTY FROM RICHARD LYLE AUSTIN, THE OWNER OF SAID PROPERTY, UNDER 21 U.S.C. § 881 (a)(4) and § 881 (a)(7).

2. WHETHER WHEN A SHOWING IS MADE THAT THE FORFEITURE OF THE ABOVE-DESCRIBED PROPERTY IS EXCESSIVE, THE GOVERNMENT MUST THEN SHOW THAT THE INTEREST ORDERED FORFEITED, NAMELY, THE ABOVE-DESCRIBED PROPERTY, IS NOT SO GROSSLY DISPORPORTIONATE TO THE

OFFENSE COMMITTED BY RICHARD LYLE AUSTIN, THE OWNER OF SAID PROPERTY, AS TO VIOLATE THE EIGHTH AMENDMENT AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE AND EXCESSIVE FINES CLAUSE CONTAINED THEREIN.

PARTIES INVOLVED

In addition to the parties appearing in the caption of this case, Richard Lyle Austin, the Owner of the above-described property, is also a party in this matter.

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LOWER COURT DECISIONS

The United States District Court for the District of South Dakota granted the Government's Motion for Summary Judgment by its Order dated April 8, 1991. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's Order in its Decision, dated May 20, 1992. The United States Court of Appeals for the Eighth Circuit denied the Petition for Rehearing and the Suggestion for Rehearing En Banc by its Order dated July 2, 1992. Copies of all of these Orders or Decisions are included in the Appendix.

JURISDICTION

1. The Decision of the United States Court of Appeals for the Eighth Circuit was filed on May 20, 1992; and the Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc was filed on July 2, 1992.

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254. This Petition for Certiorari is filed within 90 days after the entry of the Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc.

STATUTES INVOLVED

The statutes involved in this case are the following: 21 U.S.C. § 881 (a)(4) and 21 U.S.C. § 881 (a)(7). They provide in pertinent part as follows:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> > (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or

> concealment of property described in paragraph (1),(2), or (9) . . . .
>
> > (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, ...

STATEMENT OF THE CASE

Richard Lyle Austin, the Owner and Claimant in this case, is the owner of an auto body shop known as the Garretson Body Shop, located at 508 Depot Street in Garretson, South Dakota; and he is also the owner of a 1972 HMET mobile home, Serial Number 0356509G, which is located at 302 Dows Street in Garretson, South Dakota, and which is Austin's home. In this case, the Government contended that both the body shop and the mobile home were used to facilitate an illegal drug transaction; and, therefore, the Government sought forfeiture of Austin's auto body shop and his 1972 HMET mobile home, pursuant to 21 U.S.C. § 881(a)(4) and § 881 (a)(7). The Government invoked jurisdiction of the District Court pursuant to 28 U.S.C. § 1345 and § 1355. The District Court granted the Government's Motion for Summary Judgment and entered a Decree of Forfeiture in regard to the Defendant property. Austin appealed the Court's Order Granting Motion for Summary Judgment to the United States Court of Appeals for the Eighth Circuit, which affirmed the District Court in an opinion filed on May 20, 1992. The United States Court of Appeals for the Eighth Circuit subsequently denied a Petition for Rehearing and Suggestion for Rehearing En Banc on July 2, 1992.

The 1972 HMET mobile home is larger than 240 square feet, measuring at the base thereof; and it is registered in South Dakota. The mobile home is valued at approximately $3,000.00. Austin described the mobile home as his homestead, "because I use it as my home." Although Austin was incarcerated in the South Dakota State Penitentiary at the time of the appeal, he intended to return to the mobile home after he was released from the penitentiary.

The Garretson Body Shop is Austin's "business and . . . (his) livelihood." The body shop is Austin's only means to earn a living at this time. Austin has been in the auto body business for approximately twenty-five years, and he intends to live in Garretson and work at the body shop when he is released from prison. The body shop is valued at approximately $33,600.00.

The Affidavit of Donald Satterlee, attached to Plaintiff's Motion for Summary Judgment, indicated that on June 13, 1990, Keith Allen Engebretson drove to the Garretson Body Shop, located at 508 Depot Street, in Garretson, South Dakota, to purchase one gram of cocaine. The Affidavit also indicated that Keith Engebretson went into the Body Shop and transacted a deal with Richard Lyle Austin, owner and manager of the Body Shop, for cocaine. Satterlee's Affidavit then indicated that, "Austin then went from the body shop to his trailer, a 1972 HMET-mobile home bearing serial number 0356509G, located at 302 Dows Street, Garretson, South Dakota, came back and met Keith Engebretson at the body shop, and exchanged two gram of cocaine for an unknown amount of money." In Satterlee's Affidavit in Support of Search

Warrant, however, Satterlee stated that, "the Defendant then went from the Body Shop to his trailer, came back and met Keith Engebretson at the Body Shop, and exchanged one gram of cocaine for an unknown amount of money." Further, Donald Satterlee did not state specifically in either affidavit that Austin "had retrieved the cocaine from his trailer home;" but Satterlee stated in his Affidavit that, "Austin then went from the body shop to his trailer, . . . came back and met Keith Engebretson at the body shop, and exchanged two gram of cocaine for an unknown amount of money." Austin stated in his Affidavit that no money was given to him by Keith Engebretson in the Garretson Body Shop on June 13, 1990.

On June 14, 1990, a search warrant was obtained by means of Satterlee's first Affidavit, and a search of the said Body Shop and mobile home was conducted. As shown by the Return of Search Warrant and Inventory, a small amount of white powder paraphernalia and currency were found in the Claimant's mobile home. Officers also found in the shop safe in the Body Shop $3,300.00 in cash and an H & R .22 caliber revolver. Austin stated in his Affidavit that the revolver was filled with bird shot when it was seized; and that he only used the gun to shoot sparrows in his body shop. The officers also found a small amount of drugs and paraphernalia in a desk drawer in the body shop.

Austin was subsequently indicted on one count of Possession of a Controlled Drug, one count of Maintaining a Dwelling House for Keeping or Selling Drugs, one count of Possession of Controlled Drug with Intent to Distribute, and one count of

Possession of Less than One Ounce of Marijuana. On October 23, 1990, Austin pled guilty to one count of Possession of Controlled Drug With Intent to Distribute, and the other three counts were subsequently dismissed. On January 28, 1991, Austin was sentenced to seven (7) years in the South Dakota State Penitentiary on that one count of Possession of Controlled Drug With Intent to Distribute, as indicated in the Judgment and Sentence, dated January 28,1991.

On September 7, 1990, a Verified Complaint and Affidavit were filed by the Government, alleging that the above-described property was used to facilitate an illegal drug transaction and was thereby subject to forfeiture under the appropriate statutes. Notice of the action was given to Austin on September 11, 1990; and on September 21, 1990, Austin filed his claim alleging ownership of the above-described property. On October 11, 1990, Austin filed an Answer denying the allegation of the Plaintiff and asserting certain affirmative defenses. Austin has never admitted that the Defendant property was used to commit or to facilitate the commission of an illegal drug transaction.

In his deposition and his Answers to Interrogatories, Austin invoked his Constitutional right under the Fifth Amendment of the United States Constitution to remain silent when asked questions which may incriminate him in regard to criminal proceedings. Both the deposition and the Answers to Interrogatories were given prior to Claimant's sentencing on January 28, 1991. Austin did not admit that his mobile home or his body shop had been used to

store, conceal, complete a sale of drugs, or arrange a completion of a sale of drugs.

The Government moved for Summary Judgment; and Austin responded to the Motion appropriately. By its Order, dated April 8, 1991, the District Court granted the Government's Motion for Summary Judgment. Austin subsequently filed his Motion to proceed in forma pauperis, which was granted; and then Austin filed his Notice of Appeal. The Court subsequently entered a Decree of Forfeiture in regard to the Defendant property.

The Eighth Circuit Court of Appeals affirmed the District Court's Order granting Summary Judgment on May 20, 1992; and the Eighth Circuit Court of Appeals denied the Suggestion for Rehearing En Banc and the Petition for Rehearing on July 2, 1992.

ARGUMENT

This case involves an issue of grave Constutional dimension and exceptional public importance, namely, whether the concept of proportionality arising from the Eighth Amendment to the United States Constitution and set forth in Solem vs. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) and United States vs. Busher, 817 F.2d 1409 (9th Cir. 1987), should be applied to a civil forfeiture case under 21 U.S.C.§ 881 (a)(4) and § 881 (a)(7), and whether when a showing is made that a forfeiture may be excessive, the government must show that the interest ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Eighth Amendment, and the cruel and unusual punishment clause and excessive fines clause contained therein.

The Court is referred to United States vs. Halper, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989), in which the United States Supreme Court considered whether a civil penalty may constitute "punishment" for double jeopardy analysis. The Court stated, at 104 L.Ed.2d 501, that, "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purpose of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." "Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." 104 L.Ed.2d, at 501. ". . . it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 104 L.Ed.2d, at 502.

The Second Circuit Court of Appeals in U.S. vs. Certain Real Property and Premises Known As 38 Whalers Cove Drive, Babylon, New York, 954 F.2d 29 (2nd Cir. 1992), applied the rationale of U.S. vs. Halper, supra, to 21 U.S.C. § 881 (a) (7), and ruled that "Where the seized property is not itself an instrumentality of crime, however, and its total value is overwhelmingly disproportionate to the value of controlled substances involved in the statutory violation, there is a rebuttal presumption that the forfeiture is punitive in nature." 954 F.2d, at 36. The Court stated, in quoting other cases, that, "(for Eighth Amendment purposes, 'there is no substantial difference between an in rem

proceeding and a(n in personam criminal) forfeiture proceeding brought directly against the owner')." 954 F.2d, at 36. The Court further stated that, "While we are extremely sympathetic to the need to address our nation's serious narcotics problems, we do not believe that a disproportionately large forfeiture can be reasonably justified as a civil fine as opposed to punishment by placing full responsibility for the 'war on drugs' on the shoulders of every individual claimant. This is particularly so where the individual claimant's violations are relatively minor." 954 F.2d, at 37.

Although the Second Circuit Court of Appeals ultimately decided against the owner and claimant in that case, the case stands for the rule that the Eighth Amendment can apply to civil forfeiture cases. The Eighth Circuit Court of Appeals should have applied the rationale of the above-listed cases and held that the Eighth Amendment proportionality analysis does apply in the instant case. The panel in this case was obviously troubled by the disproportion between the property seized and Richard Austin's offense. The Court felt that the government had gone too far in this case but felt constrained to affirm the District Court. Application of the above cases should allow the application of the Eighth Amendment to this case.

WHEREFORE, Petitioner respectfully requests that this Court grant his Petition for Certiorari.

Dated at Sioux Falls, South Dakota, this 24th day of

September, 1992.

Richard L. Johnson
Attorney for Petitioner
101 South Main Avenue, Suite 305
Sioux Falls, South Dakota 57102
Phone (605) 338-2626

CERTIFICATE OF SERVICE

Richard L. Johnson, the undersigned attorney, hereby certifies that on the 29th day of September, 1992, he served two true and correct copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, Motion to Proceed In Forma Pauperis on Petition for Certiorari, and Affidavit in Support of Motion to Proceed in Forma Pauperis on Petition for Certiorari on the Attorney General of the United States and on Mary T. Wynne, Assistant U.S. Attorney, by mailing the same to them at their respective post office addresses as listed below:

Attorney General of United States
Main Justice Building
10th & Constitution Avenue, N.W.
Washington, D.C. 20530

Mary T. Wynne
Assistant U.S. Atty.
P.O. Box 1073
Sioux Falls, S.D. 57101

Dated at Sioux Falls, South Dakota, this 29th day of September, 1992.

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Sioux Falls, South Dakota 57102
Phone: (605) 338-2626

No. 92-6073

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RICHARD LYLE AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the civil forfeiture of property valued at $38,000 that was used by the owner for drug trafficking violated the Cruel and Unusual Punishment Clause and the Excessive Fines Clause of the Eighth Amendment.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-6073

RICHARD LYLE AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A8, is reported at 964 F.2d 814.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1992. A petition for rehearing was denied on July 2, 1992. The petition for a writ of certiorari was filed on September 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the District of South Dakota, the government filed a civil forfeiture action against the instant properties under 21 U.S.C. 881(a)(4) and 881(a)(7). The

district court granted summary judgment for the government. The court of appeals affirmed. Pet. App. A1-A8.

1. Petitioner owned an automobile body shop and mobile home in Garretson, South Dakota. On July 13, 1990, at the body shop, petitioner agreed to sell cocaine to Keith Engebretson. Petitioner left the body shop, went to his mobile home, returned to the body shop, and sold Engebretson two grams of cocaine. The next day, state law enforcement agents executed search warrants at the body shop and the mobile home. The agents seized a .22 caliber revolver, some marijuana, and $3,300 in cash from the body shop, as well as other items that are employed in selling or using drugs, such as a piece of mirror, a small white tube, and a razor blade. The agents seized a small baggie of cocaine, a bundle of cocaine marked "1/2," a baggie of marijuana, an electronic Ohaus scale, and $660 in twenty dollar bills from the mobile home. Petitioner subsequently pleaded guilty in state court to one count of possession with intent to distribute cocaine. Pet. App. A2.

2. The United States filed a civil forfeiture complaint against the body shop and the mobile home under 21 U.S.C. 881(a)(4) and 881(a)(7). The government moved for summary judgment, and supported its motion with an affidavit describing the Engebretson sale, the search of the properties, and petitioner's guilty plea in state court. Petitioner filed a motion stating that the gun found in his body shop was used to shoot birds and that he received no money from the Engebretson sale. The district court granted summary judgment for the government. Pet. App. A2-A3.

The court of appeals affirmed. First, it held that the district court properly entered summary judgment for the government. It stated that the government's affidavit showed that Austin was dealing drugs from his body shop and mobile home and that Austin's affidavit did not dispute any essential elements of the government's claim. Pet. App. A3-A4.

The court also held that the forfeiture of the instant properties did not violate the Eighth Amendment's ban on cruel and unusual punishments or excessive fines. Although the court was concerned that the penalty was "too high * * * in relation to the offense committed," Pet. App. A7, the Court held that the Eighth Amendment's proportionality requirement did not apply in a civil forfeiture case because the government was proceeding against property in rem, and "the focus of an in rem action is the guilt or innocence of the property; the owner's culpability apparently is therefore not a factor." Pet. App. A6.

ARGUMENT

Petitioner claims (Pet. 8-10) that the civil forfeiture in this case violated either the Cruel and Unusual Punishment Clause or the Excessive Fines Clause of the Eighth Amendment.

As an initial matter, because civil forfeiture statutes have long been regarded as inherently remedial in purpose, see United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362-366 (1984); One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232, 237 (1972), it is doubtful that the Eighth Amendment has any application to civil forfeitures. The Eighth Amendment is

designed to regulate punishment meted out as a result of a criminal conviction. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989) ("Given that the Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments."); Ingraham v. Wright, 430 U.S. 651, 664 (1977) ("the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government"). The weight of authority from the courts of appeals recognizes that Congress intended the forfeiture statute at issue in this case, 21 U.S.C. 881, to serve civil, remedial purposes, such as "removing the incentive to engage in drug dealing by denying drug dealers the proceeds of illgotten gains, stripping the drug trade of its instrumentalities, and financing Government programs designed to eliminate drug trafficking." United States v. Santoro, 866 F.2d 1538, 1544 (4th Cir. 1989). Since it was neither intended to be nor is a primarily punitive provision, it is not subject to the strictures of the Eighth Amendment. United States v. One Parcel of Real Property, 960 F.2d 200, 206-207 (1st. Cir. 1992); United States v. Certain Real Property Commonly Known as 6250 Ledge Road, Egg Harbor, WI, 943 F.2d 721, 727 (7th Cir. 1991); United States v. Real Property & Residence at 3097 S.W. 111th Avenue, 921 F.2d 1551, 1557 (11th Cir. 1991); United States v. One 107.9 Acre Parcel of Land Located in Warren Township, Bradford Co., Pa., 898 F.2d 396, 400-401 (3d Cir. 1990); United States v. Tax Lot 1500, 861 F.2d 232, 233-235 (9th Cir. 1988), cert. denied, 493 U.S. 954 (1989); United States v. Santoro, 866 F.2d 1538 at 1543-1544; cf. United States v. D.K.G. Appaloosas, Inc., 829 F.2d 532, 540-545 (5th Cir. 1987) (Section 881 a civil, remedial provision and not subject to Ex Post Facto Clause), cert. denied, 485 U.S. 976 (1988); United States v. McCaslin, 959 F.2d 786, 788 (9th Cir.) (civil forfeiture statutes are inherently remedial and therefore do not implicate the Double Jeopardy Clause), cert. denied, 113 S. Ct. 382 (1992).[1]

In United States v. Certain Real Property and Premises, 954 F.2d 29 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992), the Second Circuit stated that civil forfeitures may violate the Eighth Amendment. The Second Circuit relied on United States v. Halper, 490 U.S 435 (1990), in which this Court held that a civil penalty may be found to violate the Double Jeopardy Clause in the "rare case" in which the penalty is "overwhelmingly disproportionate to the damages" caused by the defendant. Id. at 449.[2] In the Second

---

[1] Petitioner's reliance (Pet. 8) on United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987), is misplaced because Busher involved a criminal forfeiture provision, 21 U.S.C. 853, not the civil forfeiture statute here. For the same reason, this case need not be held for this Court's decision in Alexander v. United States, No. 91-1526, cert. granted, June 29, 1992. That case presents the question whether a criminal forfeiture under the RICO statute, 18 U.S.C. 1963, violated the Eighth Amendment. There is no dispute in Alexander that criminal forfeitures under the RICO statute can be examined under the Eighth Amendment. See Br. for the United States 35 n.18.

[2] In Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989), the Court stated that "[its] opinion in Halper implies that punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns." 492 U.S. at 275 n.21. The Court did not, however, decide that issue, nor did it specifically address the question whether the Eighth Amendment applies to civil forfeitures, as opposed to punitive damages.

Circuit's view, the same analysis would apply to a claim that a civil forfeiture violated the Eighth Amendment. Certain Real Property, 954 F.2d at 35.

Even if the Second Circuit were correct that civil forfeitures are subject to Eighth Amendment analysis, the forfeiture in this case is constitutional. In Certain Real Property, the Second Circuit found that it was not grossly disproportionate to require forfeiture of a residence valued at $145,000, of which $68,000 represented the owner's equity interest, where the owner had used the residence twice to sell cocaine with a total weight of 2 1/2 grams for a total price of $250. The court noted that federal law and the laws of many States treat drug offenses seriously; the court's sampling indicated that a sale of the quantity at issue in Certain Real Property could subject the offender to terms of imprisonment of up to 20 years and fines of up to $1,000,000. Cf. Harmelin v. Michigan, 111 S.Ct. 2680 (1991) (mandatory life sentence without parole for possession of 672 grams of cocaine did not violate the Eighth Amendment). In that light, the Second Circuit held that "the imposition of a $68,000 fine * * *, while large, is not a grossly disproportionate punishment within the meaning of Eighth Amendment jurisprudence." 954 F.2d at 39.

Petitioner's offenses are analogous to those at issue in Certain Real Property. Petitioner obtained two grams of cocaine from his mobile home and sold it at his body shop. The subsequent searches of the properties showed that Austin stored drugs in both places for resale. The value of the forfeited properties is

approximately $38,000. Gov't. C.A. Brief at 18. If it were viewed as punishment, the forfeiture of the instant properties would therefore have been less severe than the "punishment" imposed as a result of the forfeiture in Certain Real Property. Accordingly, this case would have been decided the same had it arisen in the Second Circuit, and further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS E. BOOTH
Attorney

DECEMBER 1992

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RECEIVED
HAND DELIVERED
DEC 28 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RICHARD LYLE AUSTIN, PETITIONER)
)
V) NO. 92-6071
)
UNITED STATES OF AMERICA)

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by mail on December 28, 1992.

RICHARD L. JOHNSON
101 SOUTH MAIN AVENUE
SUITE 305
SIOUX FALLS, 57102

Kenneth W. Starr/cs
KENNETH W. STARR
Solicitor General

December 28, 1992

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RECEIVED
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DEC 28 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ARTHUR HILL, PETITIONER)
)
V) NO. 92-6095
)
UNITED STATES OF AMERICA)

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by mail on December 28, 1992.

TED C. FARMER
4300 PENOBSCOT BUILDING
DETROIT, MI 48226

Kenneth W. Starr/cs
KENNETH W. STARR
Solicitor General

December 28, 1992

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2382SDSF

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
One Parcel of Property Located at	*	
508 Depot Street, etc., et al.,	*	
	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. Judge McMillian and Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

July 2, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2382SD

United States of America, Appellee, v. One Parcel of Property Located at 508 Depot Street, Garretson, Minnehaha County, South Dakota, with all appurtenances and improvements thereon; HMET Mobile Home 1972 with Serial Number 0356509G, with appurtenances and improvements thereon; Defendants-Appellants, Richard Lyle Austin, Claimant-Appellant.	*	Appeal from the United States District Court for the District of South Dakota.

Submitted: March 13, 1992

Filed: May 20, 1992

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and LOKEN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Richard Lyle Austin appeals the district court's[1] order granting the government's motion for summary judgment in this civil forfeiture action. We affirm.

[1]The Honorable John B. Jones, United States District Judge for the District of South Dakota.

I. BACKGROUND

On June 13, 1990, Keith Engebretson met Austin at Austin's auto body shop and agreed to purchase some cocaine. After reaching an agreement with Engebretson, Austin left the body shop, went to his mobile home, and then returned to the body shop, at which time he sold Engebretson two grams of cocaine. The next day, state law enforcement officers executed search warrants at the body shop and at the mobile home. The search of the body shop uncovered a twenty-two caliber revolver, some marijuana, and $3,300 in cash. Additionally, a piece of mirror, a small white tube, and a razor blade were found on top of a barrel in the back of the shop. The search of the mobile home revealed an electronic Ohaus scale, a small baggie of cocaine, and $660 in twenty dollar bills. The search also revealed a bindle of cocaine marked "1/2" as well as a baggie of marijuana.

Austin pleaded guilty in state court to one count of possession of cocaine with intent to distribute. Shortly thereafter, the federal government initiated civil forfeiture proceedings against Austin's body shop and mobile home pursuant to 21 U.S.C. §§ 881(a)(4) and 881(a)(7) (1988).[2] Austin resisted the government's attempt to seize his property. The government moved for summary judgment and supported its motion with an affidavit describing the Engebretson sale, the search of the property, and Austin's subsequent plea and conviction. Austin submitted an affidavit stating, in relevant part, that the gun found in his body

[2]21 U.S.C. § 881(a)(4) permits the government to seize "[a]ll conveyances . . . which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of" illegal drugs or drug paraphernalia. Section 881(a)(7) authorizes forfeiture of "[a]ll real property . . . in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" certain drug related crimes.

shop was used to shoot sparrows and that he received no money from Engebretson on June 13, 1990. The district court granted the government's motion for summary judgment and this appeal followed.

II. DISCUSSION

A. Summary Judgment

"In reviewing a district court's grant of summary judgment, this court applies the same standard as the district court and views the facts in the light most favorable to the nonmovant, giving it the benefit of all reasonable inferences to be drawn from the facts." Woodsmith Publishing Co. v. Meredith Corp., 904 F.2d 1244, 1247 (8th Cir. 1990). Summary judgment is appropriate only if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Mandel v. United States, 719 F.2d 963, 965 (8th Cir. 1983).

In the context of a civil forfeiture proceeding, the government carries the initial burden of establishing probable cause; that is, it must "establish only that reasonable grounds exist to believe that the [property was] used or intended to be used for prohibited purposes." One Blue 1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759, 761 (8th Cir. 1986). The necessary level of proof is greater than mere suspicion, but is less than prima facie proof. United States v. Premises Known as 3639-2nd Street N.E., 869 F.2d 1093, 1095 (8th Cir. 1989). Once the government meets this burden, "the burden shifts to the party opposing forfeiture to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture or that a defense to forfeiture is applicable." Id. The claimant cannot meet this burden by simply resting on his or her pleadings; instead, the claimant "must set forth specific facts by affidavits or otherwise showing that there is a genuine issue for trial." One

Blue 1977 AMC Jeep, 783 F.2d at 762. "If unrebutted, a showing of probable cause alone will support forfeiture." Id. at 761.

In the present case, the government met its initial burden. The affidavit offered to support the summary judgment motion demonstrated reasonable grounds to believe both the mobile home and the body shop were used to facilitate illegal drug activity. The body shop was used as a place to meet a prospective customer, conduct negotiations, and complete a drug transaction. The affidavit also tends to support the inference that the mobile home was used as a place to store drugs. The character of these activities constitutes a sufficient connection with the prohibited conduct to enable the government to meet its initial burden.

Thus, the burden shifted to Austin. Austin's affidavit does not address, much less rebut, the essential elements of the government's affidavit. Even crediting Austin's claims that the revolver was used to shoot birds and that Engebretson did not pay any money at the time the drugs were transferred, Austin's affidavit does not dispute the government's claim that Austin sold drugs at the body shop. Similarly, Austin does not counter any of the facts tending to demonstrate the mobile home was used to store drugs.[3] Having failed to carry his burden, and having failed to raise any genuine factual issues, we conclude there were no material facts in dispute and summary judgment in favor of the government was appropriate.

[3]Austin does contend the amount of drug activity on these premises was, at best, minimal. He also points out the property represents a significant portion of his limited wealth. However, these arguments are not relevant in determining whether there was a connection or nexus between the property and the illegal conduct. Premises Known as 3639-2nd Street, 869 F.2d at 1096.

B. Eighth Amendment

Austin contends the provisions of § 881 are unconstitutional as applied to him because the seizure of his business and home violates the Eighth Amendment. The government contends the Eighth Amendment does not apply because this is a civil forfeiture action. We reluctantly agree with the government. We say "reluctantly" because we believe that the principle of proportionality is a deeply rooted concept in the common law as stated and described in Solem v. Helm, 463 U.S. 277, 284, 290-92 (1983), and that as a modicum of fairness, the principle of proportionality should be applied in civil actions that result in harsh penalties. However, we are restrained from so holding because of the decisions in prior cases on this issue hereinafter discussed.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Austin contends the district court should have conducted a proportionality analysis as required by Solem to determine whether the value of the property forfeited was "grossly disproportionate" to the illegal drugs located, and the illegal activity occurring, on the property.[4] However, the nature of a civil forfeiture proceeding renders the Eighth Amendment's proportionality analysis inappropriate.

A civil forfeiture is not an action in personam; instead, it is an action in rem. Because the government is proceeding against the "offending" property, the guilt or innocence of the property's

[4]In Harmelin v. Michigan, 111 S. Ct. 2680 (1991), one plurality of the Court expressed a desire to overrule Solem, while a majority of the Court either declined to overrule Solem or explicitly approved of Solem. See United States v. Johnson, 944 F.2d 396, 408-09 (8th Cir.) (discussing the individual Justices' views), cert. denied, 112 S. Ct. 646 (1991). Nothing in this opinion should be construed as addressing Harmelin's effect on Solem.

owner is constitutionally irrelevant, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-87 (1974); yet Austin seeks, under the guise of proportionality review, to have the district court consider the seriousness of his illegal conduct and other matters relating to his culpability vis-a-vis the forfeiture of his property. We are constrained to agree with the Ninth Circuit that "[i]f the constitution allows in rem forfeiture to be visited upon innocent owners . . . the constitution hardly requires proportionality review of forfeitures . . . ." United States v. Tax Lot 1500, 861 F.2d 232, 234 (9th Cir. 1988), cert. denied, 493 U.S. 954 (1989). The focus in an in rem action is the guilt or innocence of the property; the owner's culpability apparently is therefore not a factor.[5]

In addition to adopting the Ninth Circuit's analysis, we agree with its observation that it appears incongruous to "require[] proportionality review for forfeitures when the government proceeds in personam, but not when the government proceeds in rem." Id. Legal niceties such as in rem and in personam mean little to individuals faced with losing important and/or valuable assets. United States v. Twelve Thousand, Three Hundred Ninety Dollars, 956 F.2d 801, 808-09 (8th Cir. 1992) (Beam, J., dissenting). We do not condone drug trafficking or any drug-related activities; nonetheless, we are troubled by the government's view that any

[5]We decline to follow the analysis employed in United States v. One 107.9 Acre Parcel of Land, 898 F.2d 396, 400-01 (3d Cir. 1990) and United States v. Santoro, 866 F.2d 1538, 1543-44 (4th Cir. 1989) because those cases utilized a framework designed to distinguish between criminal and civil proceedings. We are not convinced application of the Eighth Amendment depends solely upon whether the statute is classified as criminal or civil. See Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 263-64 (1989) ("[W]e need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.").

property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction. A case supporting Austin's position could be made on the bases of the history of the Eighth Amendment as set out in Browning-Ferris, 492 U.S. at 266:

> The Eighth Amendment clearly was adopted with the particular intent of placing limits on the powers of the new Government. "At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights." Ingraham v. Wright, 430 U.S. at 666 (footnote omitted). . . . Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its "prosecutorial" power, not concern with the extent or purposes of civil damages.

In this case it does appear that the government is exacting too high a penalty in relation to the offense committed, but we are limited by the technical legal distinctions regarding in personam and in rem actions, together with the clear court decisions that the Constitution does not require proportionality -- at least, not in civil proceedings for the forfeiture of property.

In spite of the fact that the Constitution does not require consideration of the owner's fault, Congress has wisely allowed the owner's innocent lack of knowledge of illegal activity to serve as a defense to forfeiture. 21 U.S.C. §§ 881(a)(4)(C), 881(a)(7) (1988). We sincerely hope Congress re-examines § 881 and considers injecting some sort of proportionality requirement into the statute, even though the Constitution does not mandate such a result.

III. CONCLUSION

After reviewing the record de novo, we conclude Austin failed to raise a substantial issue of fact, and summary judgment in favor of the government was appropriate. We also hold the Eighth Amendment does not require that the district court conduct any type of proportionality analysis in a civil forfeiture proceeding. Consequently, we affirm the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

FILED
July 13 1992
William F Clyde
Kmt

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2382SDSF

United States of America, Appellee, vs. One Parcel of Property Located at 508 Depot Street, Garretson, Minnehaha County, South Dakota; with all appurtenances and improvemets thereon; HMET Mobile Home 1972 with Serial Number 0356509G, with appurtenances and improvements thereon, Defendants-Appellants, Richard Lyle Austin, Claimant-Appellant.	*	Appeal from the United States District Court for the District of South Dakota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 20, 1992

accrt copy
7-13-92
7-14-92

A true copy.

Attest: Michael E. Gans
Kmt

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

MANDATE ISSUED 7/9/92

FILED
APR 08 1991
William F Clyde
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, -vs- ONE PARCEL OF PROPERTY - LOCATED AT 508 DEPOT STREET, GARRETSON, MINNEHAHA COUNTY, SOUTH DAKOTA, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, and ONE 1972 HMET MOBILE HOME WITH SERIAL NUMBER 035609G, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, Defendants.	*	CIV 90-4133 ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The plaintiff's Motion for Summary Judgment came on for hearing on April 8, 1991, with the plaintiff appearing by Mary T. Wynne and with the claimant appearing by Richard L. Johnson, and

After arguments of counsel and upon the record,

IT IS ORDERED:

(1) That plaintiff's Motion for Summary Judgment is granted.

(2) That the plaintiff may submit a proposed judgment forfeiting the defendants herein pursuant to 21 U.S.C. § 881.

Dated this 8th day of April, 1991.

BY THE COURT:

John B Jones

Chief Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: Deann Tetreault
DEPUTY

(SEAL)

June 18 1991

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, CIV: 90-4133

Plaintiff,

vs. DECREE OF FORFEITURE

ONE PARCEL OF PROPERTY LOCATED AT 508 DEPOT STREET, GARRETSON, MINNEHAHA COUNTY, SOUTH DAKOTA, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, and ONE 1972 HMET MOBILE HOME WITH SERIAL NUMBER 0356509G, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,

Defendants.

---

1. On September 7, 1990, a Verified Complaint for Forfeiture against the defendant located at 508 Depot Street, Garretson, Minnehaha County, South Dakota, with all appurtenances and improvements thereon, and one 1972 HMET mobile home with serial number 0356509G with all appurtenances and improvements thereon, was filed on behalf of the plaintiff, United States of America. The Complaint alleges that the defendant real property more fully described as:

> The West One Hundred Four feet (W 104') of Lots Nineteen (19), Twenty (20) and Twenty-one (21) and the West One Hundred Four feet (W 104') of the North Twenty-six feet (N 26') of Lot Eighteen (18), all in Block Eleven (11) of Royce's Fourth Addition to Garretson, Minnehaha County, South Dakota.

with all appurtenances and improvements thereon, and the 1972 HMET mobile home with serial number 0356509G with all appurtenances and

improvements thereon, were used or intended to be used to commit or to facilitate the commission of a violation of Title II of the Controlled Substances Act, 21 U.S.C. §§ 801 et seq., punishable by more than one (1) year's imprisonment, and are therefore subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a)(7) and (a)(4).

2. It appearing that process was fully issued in this action and returned according to law;

3. That pursuant to a warrant for arrest issued by this Court, the United States Marshal for this District seized said property on September 11, 1990;

4. That on September 11, 1990, Richard Austin was personally served and acknowledged service of the Verified Complaint of Forfeiture, the Warrant of Arrest;

5. That on September 20, 27, and October 4, 1990, notice of this action was published in the Garretson Weekly newspaper;

6. That on September 21, 1990, Richard Austin filed a Claim in this matter, and on October 11, 1990, also filed an Answer.

7. On February 4, 1991, plaintiff filed its Motion for Summary Judgment, Brief in Support thereof, and Affidavit of Donald Satterlee, alleging that the defendant commercial real property was used to facilitate distribution of cocaine, in violation of 21 U.S.C. § 844, et seq., and further alleging that the defendant mobile home was used to facilitate possession of marijuana and cocaine, as well as drug paraphernalia consisting of electronic Ohaus scale, Zig Zag papers, and coke snorter, for the purpose of

distribution in violation of 21 U.S.C. § 844, et seq.. The affidavit sets forth details describing a controlled substance purchase occurring at the commercial property, and a search of the mobile home which disclosed the above described items. Claimant Austin filed his Response to the Motion for Summary Judgment on February 25, 1991.

9. A hearing was held by the Court on April 8, 1991. After review of the arguments of counsel and the file, the Court found no material fact in dispute.

10. The Court entered its Order Granting Summary Judgment to the plaintiff on April 8, 1991.

Now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendant located at 503 Depot Street, Garretson, Minnehaha County, and described as:

> The West One Hundred Four feet (W 104') of Lots Nineteen (19), Twenty (20) and Twenty-one (21) and the West One Hundred Four feet (W 104') of the North Twenty-six feet (N 26') of Lot Eighteen (18), all in Block Eleven (11) of Royce's Fourth Addition to Garretson, Minnehaha County, South Dakota.

with all appurtenances and improvements thereon, and the 1972 HMET mobile home with serial number 0356509G with all appurtenances and improvements thereon, be forfeited to the United States of America and no right, title or interest in the property shall exist in any other party. The defendant property shall be disposed of according to law.

FURTHER ORDERED, ADJUDGED AND DECREED that in accordance with 21 U.S.C. § 853(c), this Order is effective nunc pro tunc to

June 13, 1990, which is the date when the property was used to facilitate a violation of 21 U.S.C. § 881(a)(7) and (a)(4).

Dated this 18th day of ~~May~~ June, 1991.

BY THE COURT:

JOHN B. JONES
District Court Judge

ATTEST:
William F. Clayton, Clerk

By: Linda M. Ziegler
Deputy

No. 92-6073

In The

Supreme Court of the United States

October Term, 1992

RICHARD LYLE AUSTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

RICHARD L. JOHNSON
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Suite 305
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57102
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Counsel for Petitioner

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
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Counsel for Respondent

Petition For Certiorari Filed September 30, 1992
Certiorari Granted January 15, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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U.S. DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
(SOUTHERN DIVISION)

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/7/90	Verified Complaint for Forfeiture.
9/21/90	Claim by claimant Richard Lyle Austin.
10/11/90	Answer by claimant Richard Lyle Austin to Verified Complaint.
2/4/91	Motion by plaintiff USA for summary judgment.
4/8/91	Order by John B. Jones granting motion for summary judgment.
6/7/91	Notice of Appeal by claimant Richard Lyle Austin from Dist. Court decision.
6/18/91	Decree of Forfeiture by John B. Jones.
6/20/91	Motion by claimant Richard Lyle Austin to stay sale of defendant property.
6/20/91	Affidavit of Richard L. Johnson in support of Motion to Stay Sale of Defendant Property.
12/24/91	Order by John B. Jones granting motion to stay sale of defendant property.
7/6/92	Order from 8th Circuit COA Denying Petition for Rehearing and Suggestion for Rehearing En Banc.
7/13/92	Opinion from 8th Circuit COA affirming the decision of the District Court.
7/13/92	Mandate from 8th Circuit Court of Appeals affirming the decision of the District Court.

8/28/92 Motion by Plaintiff USA for order lifting the order of this court dated 12/24/91.

9/4/92 Order by John B. Jones granting motion for order lifting the order of this court dated 12/24/91.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ONE PARCEL OF PROPERTY LOCATED AT 508 DEPOT STREET, GARRETSON, MINNEHAHA COUNTY, SOUTH DAKOTA, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, and ONE 1972 HMET MOBILE HOME WITH SERIAL NUMBER 0356509G, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,

Defendants.

CIV: 90-4133

VERIFIED COMPLAINT OF FORFEITURE

(Filed September 7, 1990)

Now comes plaintiff, the United States of America, by and through one of its attorneys, Mary T. Wynne, Assistant United States Attorney for the District of South Dakota, and respectfully states as follows:

1. This is a civil action *in rem* brought to enforce the provision of 21 U.S.C. § 881(a)(7) for the forfeiture of real property which was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of 21 U.S.C. §§ 801 *et seq.*, punishable by

more than one year's imprisonment, and 21 U.S.C. § 881(a)(4) for the forfeiture of conveyances which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of a controlled substance, in violation of Title II of the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*

2. This Court has jurisdiction over this matter by virtue of 28 U.S.C. §§ 1345 and 1355.

3. The defendant is a parcel of property located at 508 Depot Street, Garretson, Minnehaha County, South Dakota, with all appurtenances and improvements thereon, more particularly described in Exhibit A which is appended hereto and fully incorporated herein by reference, and a 1972 mobile home, serial number 0356509G, located at 302 Dows Street, Garretson, South Dakota.

4. The defendant real property was acquired by the Garretson Body Shop, Inc., from Kenneth and Gertrude Barstead on or about May 11, 1982, for $20,000, by Warranty Deed recorded at Book 353, page 378 of the Minnehaha County Register of Deeds land records. On October 21, 1985, said corporation was cancelled by the South Dakota Secretary of State's office.

5. The defendant property is valued at approximately $33,600.00.

6. The defendant mobile home was acquired by Richard Austin, a/k/a Dick Austin, on or about September 21, 1977, as reflected by the Certificate of Title, attached hereto as Exhibit C.

7. The defendant mobile home is valued at approximately $3,000.00.

8. The facts and circumstances supporting the seizure and forfeiture of the defendant property are contained in Exhibit B which is attached hereto and fully incorporated herein by reference.

9. The defendant one parcel of property located at 508 Depot Street, Garretson, South Dakota, with all appurtenances and improvements thereon, and the defendant mobile home are property which were used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of Title II of the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*, punishable by more than one (1) year's imprisonment, and are, therefore, subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a)(7) and § 881(a)(4).

WHEREFORE, the United States of America prays that a warrant for arrest for the defendant one parcel of property located at 508 Depot Street, Garretson, Minnehaha County, South Dakota, with all appurtenances and improvements thereon, and the defendant 1972 HMET mobile home, be issued; that due notice be given to all parties to appear and show cause why the forfeiture should not be decreed; that judgment be entered declaring the defendant property to be condemned and forfeited to the United States of America for disposition according to law; and that the United States of America be granted such other and further relief as this Court may deem just and proper, together with the costs and disbursements of this action.

Dated this 6th day of September, 1990.

Philip N. Hogen
United States Attorney

/s/ Mary T. Wynne
Mary T. Wynne
Assistant United States Attorney
P.O. Box 1073
Sioux Falls, South Dakota 57102
(605) 330-4400

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

(Caption Omitted In Printing)

CIV: 90-

AFFIDAVIT OF DONALD SATTERLEE

STATE OF SOUTH DAKOTA)
: ss
COUNTY OF MINNEHAHA)

Donald L. Satterlee being first duly sworn on oath deposes and states as follows:

1. Affiant is a police officer with the Sioux Falls Police Department for 5 1/2 years, and a narcotics detective for 1 year.

2. Information was received that Richard Lyle Austin, on April 24, 1990, bought a 1985 blue, Escort station wagon, license 1GT324. The reason Austin needed to buy the Escort is because he was going to drive to California. He bought the station wagon from Nordstrom's Recycling in Garretson, South Dakota, and told Nordstrom's when he gave them a check for the vehicle that he didn't want the check cashed until he came back from California because he was going to come into some money.

3. On June 13, 1990, a cooperating individual, with a Keith Allen Engebretson, drove to the Garretson Body Shop at 508 Depot Street, which is run by Austin, to purchase one gram of cocaine. Keith Engebretson went into the body shop and transacted a deal with Austin for

the cocaine. Austin then went from the body shop to his trailer, a 1972 HMET-mobile home bearing serial number 0356509T, located at 302 Dows Street, Garretson, South Dakota, came back and met Keith Engebretson at the body shop, and exchanged two gram [sic] of cocaine for an unknown amount of money.

4. Keith Engebretson has been convicted for possession of a controlled substance and is a known narcotic user.

5. A search warrant was then obtained on June 14, 1990, and a search of the body shop and mobile home above described was conducted on June 14, 1990. Marijuana and cocaine, drug paraphernalia, a weapon, and currency of approximately $4,700 was found as listed on the Return of Search Warrant and Inventory, attached hereto as Exhibit 1.

/s/ Donald L. Satterlee
Donald L. Satterlee

Subscribed and sworn to before me,
this 5th day of September, 1990.

/s/ Dawn Z. Hartigan
NOTARY PUBLIC * SOUTH DAKOTA
My Commission expires: Dec. 10, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

(Caption Omitted In Printing)

CIV: 90-4133

ANSWER OF OWNER AND CLAIMANT

Comes now Richard Lyle Austin, (hereinafter known as "Claimant"), the owner of and claimant to the above-described property, and for his Answer to the Verified Complaint of Forfeiture of the Plaintiff, alleges and states as follows:

I.

Claimant denies each and every allegation, matter, and thing contained in the Verified Complaint of Forfeiture of the Plaintiff, except those matters herein specifically admitted or modified.

II.

Plaintiff's Verified Complaint fails to state a claim against the above-described property upon which relief can be granted.

III.

Claimant admits paragraphs No. 3 and No. 6 of the Plaintiff's Verified Complaint.

IV.

Claimant is without sufficient information to admit or deny paragraphs No. 5 or No. 7 of Plaintiff's Verified Complaint.

V.

Claimant states that he is the owner of one parcel of property located at 508 Depot Street, Garretson, Minnehaha County, South Dakota, with all appurtenances and improvements thereon, and one 1972 HMET mobile home with Serial Number 0356509G, with all appurtenances and improvements thereon, the above-described property; and Claimant incorporates by this reference, with the same force and effect as if set forth in its entirety, his Claim, dated September 21, 1990, a copy of which is attached hereto and marked Exhibit #1.

VI.

As an affirmative defense, Claimant states that Plaintiff should be denied that relief requested in its Verified Complaint of Forfeiture, because Plaintiff is requesting relief which procedurally and substantively denies Claimant due process of law in violation of the Fifth Amendment to the United States Constitution and in violation of laws in effect pursuant to said Amendment.

VII.

As a further affirmative defense, Claimant alleges and states that the above-described property is not property which is subject to forfeiture or seizure within the meaning of the applicable laws.

VIII.

As a further affirmative defense, Claimant states that this seizure and forfeiture proceeding denies Claimant

the right against double jeopardy, in violation of the Fifth Amendment to the United States Constitution.

IX.

As a further affirmative defense, Claimant alleges and states that the present seizure and forfeiture proceeding permits criminal punishment by a civil burden of proof and switches and the burden of proof, requiring Claimant to prove his innocence, in violation of the Fifth and Sixth Amendments to the United States Constitution.

X.

As a further affirmative defense, Claimant alleges and states that the Court does not have subject matter jurisdiction of these proceedings.

WHEREFORE Claimant prays that the Plaintiff's Verified Complaint be dismissed upon its merits and with prejudice, and that the Claimant have and recover his costs and disbursements herein.

Dated at Sioux Falls, South Dakota, this 11th day of October, 1990.

/s/ Richard Lyle Austin
Richard Lyle Austin, Claimant

/s/ Richard L. Johnson
Richard L. Johnson
Attorney for Claimant
101 South Main Avenue, Suite 305
Sioux Falls, South Dakota 57102
Phone (605) 338-2626

DEMAND FOR JURY TRIAL

Comes now the Claimant, Richard Lyle Austin, and hereby demands a trial by jury on all issues in the above-entitled matter.

Dated at Sioux Falls, South Dakota, this 11th day of

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

(Caption Omitted in Printing)

CIV: 90-4133

AFFIDAVIT OF DONALD SATTERLEE

STATE OF SOUTH DAKOTA)
: ss
COUNTY OF MINNEHAHA)

Donald L. Satterlee being first duly sworn on oath deposes and states as follows:

1. Affiant is a police officer with the Sioux Falls Police Department for 5 1/2 years, and a narcotics detective for 1 year.

2. Information was received that on April 24, 1990, Richard Lyle Austin bought a 1985 blue, Escort station wagon, license 1GT324. The reason Austin needed to buy the Escort is because he was going to drive to California. He bought the station wagon from Nordstrom's Recycling in Garretson, South Dakota, and told Nordstrom's when he gave them a check for the vehicle that he didn't want the check cashed until he came back from California because he was going to come into some money.

3. On June 13, 1990, a cooperating individual, with a Keith Allen Engebretson, drove to the Garretson Body Shop at 508 Depot Street, which is run by Austin, to purchase one gram of cocaine. Keith Engebretson went into the body shop and transacted a deal with Austin for

the cocaine. Austin then went from the body shop to his trailer, a 1972 HMET-mobile home bearing serial number 0356509T, located at 302 Dows Street, Garretson, South Dakota, came back and met Keith Engebretson at the body shop, and exchanged two gram [sic] of cocaine for an unknown amount of money.

4. Keith Engebretson has been convicted for possession of a controlled substance and is a known narcotic user.

5. A search warrant was then obtained on June 14, 1990, and a search of the body shop and mobile home above described was conducted on June 14, 1990. Marijuana, cocaine, a weapon, drug paraphernalia, and currency of approximately $4,700 were found as listed on the Return of Search Warrant and Inventory, attached hereto as Exhibit 1.

6. Based upon the above sale of cocaine occurring at the Garretson Body Shop, Richard Lyle Austin was indicted on two counts of possession of cocaine, maintaining a place for keeping or selling drugs, and one count of possession of marijuana on August 2, 1990.

7. On October 23, 1990, Richard Austin admitted to the distribution and possession as charged in open court, and pled guilty in the Second Judicial Circuit state court to possession with intent to distribute cocaine. Said guilty plea was the result of the investigation as set forth above.

8. Austin was found guilty and sentenced to seven years in the state penitentiary on January 28, 1991. See certified copy of judgment attached as Exhibit 2.

/s/ Donald L. Satterlee
Donald L. Satterlee

Subscribed and sworn to before me,
this 1st day of February, 1991.

/s/ Thomas J. Wright
NOTARY PUBLIC • SOUTH DAKOTA
My Commission expires: 6-27-92

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

(Caption Omitted In Printing)

CIV. 90-4133

AFFIDAVIT OF
RICHARD LYLE AUSTIN

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

RICHARD LYLE AUSTIN, being first duly sworn, on oath deposes and states as follows:

1. That I am the Owner of the above-described Defendant property, Garretson Body Shop, located at 508 Depot Street in Garretson, South Dakota, with all appurtenances and improvements thereon, and the 1972 HMET mobile home, located at 302 Dows Street in Garretson, South Dakota; and I make this Affidavit in opposition to the Plaintiff's Motion for Summary Judgment.

2. I am the Owner of the 1972 HMET mobil home, with serial number 035609G, located at 302 Dows Street in Garretson, South Dakota. This mobile home is larger than 240 square feet, measuring at the base thereof, and it is registered in South Dakota. This mobile home is by homestead, because I use it as my home. Although I am presently incarcerated in the South Dakota State Penitentiary, my mobile home at 302 Dows Street remains my home for homestead purposes. I intend to return to the mobile home after I am released from the Penitentiary,

and I consider the mobile home to be my home at this time.

3. That the H & R .22 caliber revolver which was seized by the officers from my shop safe was filled with bird shot when it was seized. I only use this gun to shoot sparrows in my body shop.

4. The Garretson Body Shop, located at 508 Depot Street in Garretson, South Dakota, is my business and my livelihood. I have been in the auto body business for approximately 25 years; and the Garretson Body Shop represents my only means to earn a living at this time. I intend to return to Garretson to live and work at the Garretson Body Shop when I am released from prison.

5. Contrary to the allegations in Donald Satterlee's Affidavit, no money was given to me by Keith Engebretson in the Body Shop on June 13, 1990.

WHEREFORE, Affiant respectfully requests that the Court deny the Plaintiff's Motion for Summary Judgment in this matter, and that the Court grant Affiant a jury trial, since there are genuine issues of material fact to be decided by the trier of fact in this forfeiture action.

Dated at Sioux Falls, South Dakota, this 25 day of February, 1991.

/s/ Richard Lyle Austin
Richard Lyle Austin
Owner and Claimant

Subscribed and sworn to before me this 25th day of February, 1991.

/s/ Richard L. Johnson
Notary Public – South Dakota

MY COMMISSION EXPIRES: 1-23-94

(SEAL)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

(Caption Omitted In Printing)

Docket No. 90-4133

Sioux Falls, South Dakota
April 8, 19991[sic]
10:00 o'clock a.m.

TRANSCRIPT OF HEARING ON MOTION
BEFORE THE HONORABLE JOHN B. JONES

[12] • • •

THE COURT: The Congress has determined that as a policy matter that one of the means of attacking the drug business is to forfeit property that has any connection with the drug business and it is the view of the Court that these forfeiture laws do not violate any constitutional rights of the Claimant and do not constitute excessive fines or cruel and unusual punishment.

I also find that the civil forfeiture action does not constitute a second prosecution thereby violating Fifth Amendment claims against double jeopardy.

The plaintiff's Motion for Summary Judgment raises the factual issue of whether or not there is sufficient connection between the property sought to be forfeited and the Defendant's involvement in the drug business to permit forfeiture under the Federal Forfeiture Acts. In this case the Defendant pled guilty to one transaction, one drug transaction, which occurred at the business property at the body-shop. Subsequent thereto, Search Warrants were executed on both the body-shop and the

residence consisting of the trailer-house. Small quantities of drugs and a scale, were found at the residence, along with cash. Cash and small quantities of drugs were found in the business property. The fact that there were no large quantities of drugs found in [13] either place does not defeat the forfeiture.

The Court views what the resolver [sic] was used for might have some impact on a criminal prosecution, but it doesn't have any impact either way in this civil forfeiture action.

The Court finds that from the undisputed facts in this case that there is a sufficient nexus between the Defendant's drug transactions and the two parcels of real estate to permit their forfeiture under 21 U.S.C. 881.

The plaintiff's Motion for Summary Judgment will, therefore, be granted.

The Court will be in recess.

United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Appellee,

v.

ONE PARCEL OF PROPERTY LOCATED AT 508 DEPOT STREET, GARRETSON, MINNEHAHA COUNTY, SOUTH DAKOTA, with all appurtenances and improvements thereon; HMET Mobile Home 1972 with Serial Number 0356509G, with appurtenances and improvements thereon, Defendants-Appellants,

Richard Lyle Austin, Claimant-Appellant.

No. 91-2382SD.

Submitted March 13, 1992.

Decided May 20, 1992.
Rehearing and Rehearing En Banc
Denied July 2, 1992.

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and LOKEN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Richard Lyle Austin appeals the district court's[1] order granting the government's motion for summary judgment in this civil forfeiture action. We affirm.

---

[1] The Honorable John B. Jones, United States District Judge for the District of South Dakota.

I. BACKGROUND

On June 13, 1990, Keith Engebretson met Austin at Austin's auto body shop and agreed to purchase some cocaine. After reaching an agreement with Engebretson, Austin left the body shop, went to his mobile home, and then returned to the body shop, at which time he sold Engebretson two grams of cocaine. The next day, state law enforcement officers executed search warrants at the body shop and at the mobile home. The search of the body shop uncovered a twenty-two caliber revolver, some marijuana, and $3,300 in cash. Additionally, a piece of mirror, a small white tube, and a razor blade were found on top of a barrel in the back of the shop. The search of the mobile home revealed an electronic Ohaus scale, a small baggie of cocaine, and $660 in twenty dollar bills. The search also revealed a bindle [sic] of cocaine marked "1/2" as well as a baggie of marijuana.

Austin pleaded guilty in state court to one count of possession of cocaine with intent to distribute. Shortly thereafter, the federal government initiated civil forfeiture proceedings against Austin's body shop and mobile home pursuant to 21 U.S.C. §§ 881(a)(4) and 881(a)(7) (1988).[2] Austin resisted the government's attempt to seize

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[2] 21 U.S.C. § 881(a)(4) permits the government to seize "[a]ll conveyances . . . which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of" illegal drugs or drug paraphernalia. Section 881(a)(7) authorizes forfeiture of "[a]ll real property . . . in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" certain drug related crimes.

his property. The government moved for summary judgment and supported its motion with an affidavit describing the Engebretson sale, the search of the property, and Austin's subsequent plea and conviction. Austin submitted an affidavit stating, in relevant part, that the gun found in his body shop was used to shoot sparrows and that he received no money from Engebretson on June 13, 1990. The district court granted the government's motion for summary judgment and this appeal followed.

II. DISCUSSION

A. Summary Judgment

"In reviewing a district court's grant of summary judgment, this court applies the same standard as the district court and views the facts in the light most favorable to that nonmovant, giving it the benefit of all reasonable inferences to be drawn from the facts." *Woodsmith Publishing Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990). Summary judgment is appropriate only if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Mandel v. United States*, 719 F.2d 963, 965 (8th Cir. 1983).

In the context of a civil forfeiture proceeding, the government carries the initial burden of establishing probable cause; that is, it must "establish only that reasonable grounds exist to believe that the [property was] used or intended to be used for prohibited purposes." *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 761 (8th Cir. 1986). The necessary level of proof is greater than mere suspicion, but is less than prima facie proof. *United, States v. Premises Known as 3639-2nd Street N.E.*,

869 F.2d 1093, 1095 (8th Cir. 1989). Once the government meets this burden, "the burden shifts to the party opposing forfeiture to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture or that a defense to forfeiture is applicable." *Id.* The claimant cannot meet this burden by simply resting on his or her pleadings; instead, the claimant "must set forth specific facts by affidavits or otherwise showing that there is a genuine issue for trial." *One Blue 1977 AMC Jeep*, 783 F.2d at 762. "If unrebutted, a showing of probable cause alone will support forfeiture." *Id.* at 761.

In the present case, the government met its initial burden. The affidavit offered to support the summary judgment motion demonstrated reasonable grounds to believe both the mobile home and the body shop were used to facilitate illegal drug activity. The body shop was used as a place to meet a prospective customer, conduct negotiations, and complete a drug transaction. The affidavit also tends to support the inference that the mobile home was used as a place to store drugs. The character of these activities constitutes a sufficient connection with the prohibited conduct to enable the government to meet its initial burden.

Thus, the burden shifted to Austin. Austin's affidavit does not address, much less rebut, the essential elements of the government's affidavit. Even crediting Austin's claims that the revolver was used to shoot birds and that Engebretson did not pay any money at the time the drugs were transferred, Austin's affidavit does not dispute the government's claim that Austin sold drugs at the body shop. Similarly, Austin does not counter any of the facts tending to demonstrate the mobile home was used to

store drugs.[3] Having failed to carry his burden, and having failed to raise any genuine factual issues, we conclude there were no material facts in dispute and summary judgment in favor of the government was appropriate.

B. Eighth Amendment

Austin contends the provisions of § 881 are unconstitutional as applied to him because the seizure of his business and home violates the Eighth Amendment. The government contends the Eighth Amendment does not apply because this is a civil forfeiture action. We reluctantly agree with the government. We say "reluctantly" because we believe that the principle of proportionality is a deeply rooted concept in the common law as stated and described in *Solem v. Helm*, 463 U.S. 277, 284, 290-92, 103 S.Ct. 3001, 3009-11, 77 L.Ed.2d 637 (1983), and that as a modicum of fairness, the principle of proportionality should be applied in civil actions that result in harsh penalties. However, we are restrained from so holding because of the decisions in prior cases on this issue hereinafter discussed.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Austin

---

[3] Austin does contend the amount of drug activity on these premises was, at best, minimal. He also points out the property represents a significant portion of his limited wealth. However, these arguments are not relevant in determining whether there was a connection or nexus between the property and the illegal conduct. *Premises Known as 3639-2nd Street*, 869 F.2d at 1096.

contends the district court should have conducted a proportionality analysis as required by *Solem* to determine whether the value of the property forfeited was "grossly disproportionate" to the illegal drugs located, and the illegal activity occurring, on the property.[4] However, the nature of a civil forfeiture proceeding renders the Eighth Amendment's proportionality analysis inappropriate.

A civil forfeiture is not an action *in personam;* instead, it is an action *in rem*. Because the government is proceeding against the "offending" property, the guilt or innocence of the property's owner is constitutionally irrelevant, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-87, 94 S.Ct. 2080, 2091-94, 40 L.Ed.2d 452 (1974); yet Austin seeks, under the guise of proportionality review, to have the district court consider the seriousness of his illegal conduct and other matters relating to his culpability vis-a-vis the forfeiture of his property. We are constrained to agree with the Ninth Circuit that "[i]f the constitution allows *in rem* forfeiture to be visited upon innocent owners . . . the constitution hardly requires proportionality review of forfeitures. . . . " *United States v. Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir. 1988), *cert. denied*, 493 U.S. 954, 110 S.Ct. 364, 107 L.Ed.2d 351 (1989). The focus in an *in rem* action is the guilt or innocence of

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[4] In *Harmelin v. Michigan*, ___ U.S. ___, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), one plurality of the Court expressed a desire to overrule *Solem*, while a majority of the Court either declined to overrule *Solem* or explicitly approved of *Solem*. *See United States v. Johnson*, 944 F.2d 396, 408-09 (8th Cir.) (discussing the individual Justices' views), *cert. denied*, ___ U.S. ___, 112 S.Ct. 646, 116 L.Ed.2d 663 (1991). Nothing in this opinion should be construed as addressing *Harmelin's* effect on *Solem*.

the property; the owner's culpability apparently is therefore not a factor.[5]

In addition to adopting the Ninth Circuit's analysis, we agree with its observation that it appears incongruous to "require[] proportionality review for forfeitures when the government proceeds *in personam*, but not when the government proceeds *in rem*." *Id.* Legal niceties such as *in rem* and *in personam* mean little to individuals faced with losing important and/or valuable assets. *United States v. Twelve Thousand, Three Hundred Ninety Dollars*, 956 F.2d 801, 808-09 (8th Cir. 1992) (Beam, J., dissenting). We do not condone drug trafficking or any drug-related activities; nonetheless, we are troubled by the government's view that *any* property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction. A case supporting Austin's position could be made on the

---

[5] We decline to follow the analysis employed in *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 400-01 (3d Cir. 1990) and *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989) because those cases utilized a framework designed to distinguish between criminal and civil proceedings. We are not convinced application of the Eighth Amendment depends solely upon whether the statute is classified as criminal or civil. *See Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 263-64, 109 S.Ct. 2909, 2914, 106 L.Ed.2d 219 (1989) ("[W]e need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.").

bases of the history of the Eighth Amendment as set out in *Browning-Ferris*, 492 U.S. at 266, 109 S.Ct. at 2915:

> The Eighth Amendment clearly was adopted with the particular intent of placing limits on the powers of the new Government. "At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights." *Ingraham v. Wright*, 430 U.S. [651] at 666 [97 S.Ct. 1401, 1409-10, 51 L.Ed.2d 711 (1977)] (footnote omitted). . . . Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its "prosecutorial" power, not concern with the extent or purposes of civil damages.

In this case it does appear that the government is exacting too high a penalty in relation to the offense committed, but we are limited by the technical legal distinctions regarding *in personam* and *in rem* actions, together with the clear court decisions that the Constitution does not require proportionality – at least, not in civil proceedings for the forfeiture of property.

In spite of the fact that the Constitution does not require consideration of the owner's fault, Congress has wisely allowed the owner's innocent lack of knowledge of illegal activity to serve as a defense to forfeiture. 21 U.S.C. §§ 881(a)(4)(C), 881(a)(7) (1988). We sincerely hope Congress reexamines § 881 and considers injecting some sort of proportionality requirement into the statute, even though the Constitution does not mandate such a result.

III. CONCLUSION

After reviewing the record *de novo*, we conclude Austin failed to raise a substantial issue of fact, and summary judgment in favor of the government was appropriate. We also hold the Eighth Amendment does not require that the district court conduct any type of proportionality analysis in a civil forfeiture proceeding. Consequently, we affirm the district court.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Judge McMillian and Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

July 2, 1992.

Supreme Court of the United States

No. 92-6073

Richard Lyle Austin,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of the petitioner must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., March 1, 1993. The brief of the respondent must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., March 31, 1993. A reply brief, if any, must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., April 12, 1993. Rule 29 does not apply. The case is set for oral argument during the Session beginning April 19, 1993.

January 15, 1993

(5)

No. 92-6073

In The

Supreme Court of the United States

October Term, 1992

RICHARD LYLE AUSTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE CONCEPT OF PROPORTIONALITY ARISING FROM THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION SHOULD BE APPLIED TO THE FORFEITURE, UNDER 21 U.S.C. § 881(a)(4) AND § 881(a)(7), OF THE GARRETSON BODY SHOP AND THE 1972 HMET MOBILE HOME FROM RICHARD LYLE AUSTIN, THE OWNER OF SAID PROPERTY.

2. WHETHER WHEN A SHOWING IS MADE THAT THE FORFEITURE OF THE GARRETSON BODY SHOP AND THE 1972 HMET MOBILE HOME IS EXCESSIVE, THE GOVERNMENT MUST THEN SHOW THAT THE INTEREST ORDERED FORFEITED, NAMELY, THE AFORESAID PROPERTY, IS NOT SO GROSSLY DISPROPORTIONATE TO THE OFFENSE COMMITTED BY RICHARD LYLE AUSTIN, THE OWNER OF SAID PROPERTY, AS TO VIOLATE THE EIGHTH AMENDMENT AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE AND EXCESSIVE FINES CLAUSE CONTAINED THEREIN.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (J.A. 21) is reported at 964 F.2d 814.

JURISDICTION

The Decision of the United States Court of Appeals for the Eighth Circuit was entered on May 20, 1992. The Eighth Circuit Court of Appeals entered an Order Denying a Petition for Rehearing and Suggestion for Rehearing *En Banc* on July 2, 1992. The Petition for Certiorari was filed on September 30, 1992; and Certiorari was granted on January 15, 1993. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Eighth Amendment to the Constitution provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The statutes involved in this case are: 21 U.S.C. § 881(a)(4) and 21 U.S.C. § 881(a)(7). They provide in pertinent part as follows:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> > (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that –

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by

reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

Richard Lyle Austin, the Owner, Claimant, and Petitioner in this case, was the owner of an auto body shop known as the Garretson Body Shop, located at 508 Depot Street in Garretson, South Dakota; and he was also the owner of a 1972 HMET mobile home, Serial Number 0356509G, located at 302 Dows Street in Garretson, South Dakota, and which was Austin's home. (J.A. 4). In this case, the Respondent, United States of America, contended that both the body shop and the mobile home were used to facilitate an illegal drug transaction; and, therefore, the Government sought forfeiture of Austin's auto body shop and his 1972 HMET mobile home, pursuant to 21 U.S.C. § 881(a)(4) and § 881(a)(7). (J.A. 5). The Government invoked jurisdiction of the District Court pursuant to 28 U.S.C. § 1345 and § 1355. The District Court granted the Government's Motion for Summary Judgment and entered a Decree of Forfeiture in regard to the Defendant property. (R. 32, 37). Austin appealed the District Court's Order Granting Motion for Summary Judgment to the United States Court of Appeals for the Eighth Circuit, which affirmed the District Court in an opinion filed on May 20, 1992. The United States Court of Appeals for the Eighth Circuit subsequently denied a Petition for Rehearing and Suggestion for Rehearing *En Banc* on July 2, 1992. (J.A. 29).

The 1972 HMET mobile home is larger than 240 square feet, measuring at the base thereof; and it is registered in South Dakota. (J.A. 16). The mobile home is valued at approximately $3,000.00. (J.A. 5). Austin

described the mobile home as his homestead, "because I use it as my home." Although Austin was serving his sentence in the South Dakota State Penitentiary at the time of the appeal to the United States Court of Appeals for the Eighth Circuit, he intended to return to the mobile home after he was released from the penitentiary. (J.A. 16).

The Garretson Body Shop was Austin's "business and . . . (his) livelihood." The body shop was Austin's only means to earn a living. Austin has been in the auto body business for approximately twenty-five years, and he intended to live in Garretson and work at the body shop when he was released from prison. (J.A. 17) The body shop was valued at approximately $33,600.00. (J.A. 4).

Although the District Court stayed the execution of the Decree of Forfeiture pending Austin's appeal to the Eighth Circuit Court of Appeals, after the Petition for Rehearing and Suggestion for Rehearing En Banc was denied, the District Court lifted the stay Order, (R. 47), and the mobile home and body shop have subsequently been sold.

The Affidavit of a South Dakota state detective, Donald Satterlee, attached to Plaintiff's Motion for Summary Judgment, indicated that on June 13, 1990, Keith Allen Engebretson drove to the Garretson Body Shop, located at 508 Depot Street, in Garretson, South Dakota, to purchase one gram of cocaine. The Affidavit also indicated that Keith Engebretson went into the Body Shop and transacted a deal with Richard Lyle Austin, owner and manager of the Body Shop, for cocaine. Satterlee's Affidavit then indicated that, "Austin then went from the body shop to his trailer, a 1972 HMET-mobile home bearing serial number 0356509G, located at 302 Dows Street, Garretson, South Dakota, came back and met Keith

Engebretson at the body shop, and exchanged two gram [sic] of cocaine for an unknown amount of money." (J.A. 13-14). In Satterlee's Affidavit in Support of Search Warrant, however, Satterlee stated that, "the Defendant then went from the Body Shop to his trailer, came back and met Keith Engebretson at the Body Shop, and exchanged one gram of cocaine for an unknown amount of money." Further, Donald Satterlee did not state specifically in either affidavit that Austin "had retrieved the cocaine from his trailer home;" but Satterlee stated in his Affidavit that, "Austin then went from the body shop to his trailer, . . . came back and met Keith Engebretson at the body shop, and exchanged two gram [sic] of cocaine for an unknown amount of money." (J.A. 14). Austin stated in his Affidavit that no money was given to him by Keith Engebretson in the Garretson Body Shop on June 13, 1990. (J.A. 17).

On June 14, 1990, the State of South Dakota obtained a search warrant by means of Satterlee's first Affidavit, and a search of the body shop and mobile home was conducted. As shown by the Return of Search Warrant and Inventory, a small amount of white powder and marijuana, paraphernalia, and currency were found in the Claimant's mobile home. Officers also found in the shop safe in the Body Shop $3,300.00 in cash and an H & R .22 caliber revolver. (R. 27-28). Austin stated in his Affidavit that the revolver was filled with bird shot when it was seized; and that he only used the gun to shoot sparrows in his body shop. (J.A. 17). The officers also found a small amount of drugs and paraphernalia in a desk drawer in the body shop. (R. 28).

Austin was subsequently indicted on one count of Possession of a Controlled Drug, one count of Maintaining a Dwelling House for Keeping or Selling Drugs, one count of Possession of Controlled Drug with Intent to

Distribute, and one count of Possession of Less than One Ounce of Marijuana. On October 23, 1990, Austin pled guilty in state court to one count of Possession of Controlled Drug With Intent to Distribute, and the other three counts were subsequently dismissed. (R. 29). On January 28, 1991, Austin was sentenced to seven (7) years in the South Dakota State Penitentiary on that one count of Possession of Controlled Drug With Intent to Distribute, as indicated in the Judgment and Sentence, dated January 28, 1991.

On September 7, 1990, a Verified Complaint and Affidavit were filed by the federal government, alleging that the above-described property was used to facilitate an illegal drug transaction and was thereby subject to forfeiture under the appropriate statutes. (J.A. 3-6). Notice of the action was given to Austin on September 11, 1990; and on September 21, 1990, Austin filed his claim alleging ownership of the above-described property. On October 11, 1990, Austin filed an Answer denying the allegation of the Plaintiff and asserting certain affirmative defenses. (J.A. 9-11).

In his deposition and his Answers to Interrogatories, Austin invoked his Constitutional right under the Fifth Amendment of the United States Constitution to remain silent when asked questions which may incriminate him in regard to criminal proceedings. Both the deposition and the Answers to Interrogatories were given prior to Claimant's sentencing on January 28, 1991.

The Government moved for Summary Judgment; and Austin responded to the Motion appropriately. By its Order, dated April 8, 1991, the District Court granted the Government's Motion for Summary Judgment. Austin subsequently filed his Motion to proceed *in forma pauperis*, which was granted; and then Austin filed his Notice

of Appeal. The Court subsequently entered a Decree of Forfeiture in regard to the Defendant property. (R. 37).

The Eighth Circuit Court of Appeals affirmed the District Court's Order granting Summary Judgment on May 20, 1992. See *United States v. One Parcel of Property*, 964 F.2d 814 (8th Cir. 1992). In the Court's Opinion, Senior Circuit Judge, Floyd R. Gibson, "reluctantly" agreed with the Government that the Eighth Amendment did not apply to this case, because it is a civil forfeiture action. Judge Gibson continued:

> We say "reluctantly" because we believe that the principle of proportionality is a deeply rooted concept in the common law as stated and described in *Solem v. Helm*, 463 U.S. 277, 284, 290-92, 103 S.Ct. 3001, 3009-11, 77 L.Ed. 2d 637 (1983), and that as a modicum of fairness, the principle of proportionality should be applied in civil actions that result in harsh penalties. However, we are restrained from so holding because of the decisions in prior cases on this issue hereinafter discussed.

Id. 964 F.2d 817. (J.A. 25). The Eighth Circuit Court of Appeals denied the Petition for Rehearing and the Suggestion for Rehearing *En Banc* on July 2, 1992. *Id.* at 818. (J.A. 29).

Austin subsequently petitioned this Court for Certiorari in a Petition filed on September 30, 1992. Certiorari was granted by this Court in an Order entered on January 15, 1993. (J.A. 30).

SUMMARY OF ARGUMENT

The history of the Eighth Amendment demonstrates that the concept of proportionality applies to forfeiture proceedings through its Excessive Fines Clause. The principle of proportionality, that a punishment should be proportionate to the crime, is deeply rooted in English

Common Law. Magna Carta required "amercements" to be proportionate to the wrong and also required that the "amercement" not be so large as to deprive a person of his livelihood. The term "amercements" later became equivalent to the term "fines"; and the English Bill of Rights of 1689, which contained the same language as the Eighth Amendment, incorporated the principle of proportionality from Magna Carta. When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, therefore, they also adopted the English principle of proportionality. The protections encompassed by the English Bill of Rights of 1689 encompassed civil, as well as criminal, proceedings brought by the Sovereign.

Since the history of the Excessive Fines Clause shows that it is applicable to civil as well as criminal government sanctions, and since the broad civil forfeiture law leaves open the potential for wide Government abuse, the Excessive Fines Clause of the Eighth Amendment should apply to civil forfeitures under 21 U.S.C. § 881(1)(4) and § 881(a)(7).

The *in rem/in personam* distinction should not bar the application of the Excessive Fines Clause of the Eighth Amendment to forfeiture proceedings under 21 U.S.C. § 881(a)(4) and § 881(a)(7). This Court has applied Fourth Amendment and Fifth Amendment *in personam* protections to *in rem* proceedings which are quasi-criminal in character. Further, the forfeiture provisions of 21 U.S.C. §§ 881(a)(4) and (7) have innocent owner exceptions, and are predicated on violations of the Controlled Substances Act. Thus, the real objective of the forfeiture law is to impose a penalty upon those who are significantly involved in drug activity. Where an individual has suffered severe penalties in an *in rem* forfeiture proceeding, it is appropriate to address the substance of that proceeding, rather than adhering to the *in rem* fiction.

Applying the rationale of *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989), to the instant case, it is clear that the effect of the forfeiture of Petitioner's property cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes. Therefore, although denominated a civil proceeding, the civil forfeiture action against Petitioner constitutes punishment.

The Excessive Fines Clause of the Eighth Amendment provides a clearer basis for proportionality analysis of civil forfeiture proceedings under 21 U.S.C. § 881(a)(4) and 21 U.S.C. § 881(a)(7) than the cruel and unusual punishments clause. Factors developed by Circuit Courts in applying the objective criteria set forth in *Solem v. Helm*, 463 U.S. 277 (1983), are helpful, however, in fashioning an objective test that would assist this Court in focusing on the criminal activity that Congress strongly wishes to sanction under 21 U.S.C. § 881, and also in protecting individuals from Eighth Amendment abuses under the Excessive Fines Clause. Magna Carta, and its amercements clause, should also be considered in developing this objective test.

In applying the Excessive Fines Clause to the forfeiture of Petitioner's property under 21 U.S.C. § 881(a)(4) and (7), a threshold determination should be made whether the forfeiture is excessive. If the forfeiture is determined to be excessive, then the Government must show that the property ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Excessive Fines Clause of the Eighth Amendment. The determination of whether the forfeiture is grossly disproportionate under the Excessive Fines Clause of the Eighth Amendment should be made taking several objective factors regarding the owner of the property and the property itself into consideration.

ARGUMENT

I. THE CONCEPT OF PROPORTIONALITY ARISING FROM THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION SHOULD BE APPLIED TO THE FORFEITURE, UNDER 21 U.S.C. § 881(a)(4) AND § 881(a)(7), OF THE GARRETSON BODY SHOP AND THE 1972 HMET MOBILE HOME FROM RICHARD LYLE AUSTIN, THE OWNER OF SAID PROPERTY.

A. The history of the Eighth Amendment shows that the concept of proportionality applies to forfeiture proceedings through the Excessive Fines Clause.

Richard Lyle Austin was the owner of the Garretson Body Shop, located at 508 Depot Street in Garretson, Minnehaha County, South Dakota. He was also the owner of the 1972 HMET mobile home, which was his residence and homestead. The auto body shop and mobile home were seized by the Government under 21 U.S.C. § 881(a)(4) and 21 U.S.C. § 881(a)(7). (See **STATUTES INVOLVED,** *supra,* at page 1.) It is the Petitioner's contention that the concept of proportionality, which is inherent in the Eighth Amendment to the United States Constitution, should be applied to forfeiture of real and personal property under 21 U.S.C. § 881(a)(4) and 21 U.S.C. § 881(a)(7).

The Eighth Amendment to the Constitution of the United States provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The history of the Eighth Amendment demonstrates that the concept of proportionality applies to forfeiture proceedings through its Excessive Fines Clause.

Several previous cases before this Court have noted that " . . . it is clear that the Eighth Amendment was

'based directly on Art. I, § 9, of the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.' " *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 266, 109 S.Ct. 2909, 2916 (1989), quoting *Solem v. Helm,* 463 U.S. 277, 285 n.10, 103 S.Ct. 3001, 3007, n.10, 77 L.Ed.2d 637 (1983). "Clause 10 of the English Bill of Rights of 1689, like our Eighth Amendment, states that, 'excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.' " *Browning-Ferris, supra,* 492 U.S. at 266, 109 S.Ct. at 2916. The principle of proportionality was familiar to English law at the time the English Bill of Rights was drafted. "The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm, supra,* 463 U.S. at 284, 103 S.Ct. at 3006-3007.

The history of the English Bill of Rights begins before the adoption of the Magna Carta. At some point after the Norman Conquest of England in 1066, the concept of "amercements" developed:

> Amercements were payments to the Crown, and were required of individuals who were 'in the King's mercy,' because of some act offensive to the Crown. Those acts ranged from what we today would consider minor criminal offenses, such as breach of the King's peace with force and arms, to 'civil' wrongs against the King, such as infringing 'a final concord' made in the King's Court.

Browning-Ferris Industries, supra, 492 U.S. at 269, 109 S.Ct. at 2917. The majority opinion in *Browning-Ferris Industries* described an amercement as an " 'all-purpose' royal penalty," which was used " . . . not only against plaintiffs who failed to follow the complex rules of pleading and against defendants who today would be liable in tort, but

also against an entire township which failed to live up to its obligations, or against a sheriff who neglected his duties." *Id.*

Although it has been said that "[a]n amercement was similar to a modern-day fine, it was the most common criminal sanction in 13th-century England," *Solem v. Helm, supra,* 463 U.S. at 284 n.8, 103 S.Ct. at 3006 n.8, citing 2 F.Pollock & F. Maitland, *The History of English Law* 513-515 (2d ed. 1909). Blackstone " . . . clearly thought that amercements were civil punishments." *Browning-Ferris Industries, supra,* 492 U.S. at 288, 109 S.Ct. at 2927 (O'Connor, concurring in part and dissenting in part, citing 4 W. Blackstone, Commentaries on The Laws of England 372). One commentator has also noted that the "amercement was assessed most commonly as a civil sanction for wrongfully bringing or defending a civil lawsuit." Massey, *The Excessive Fines Clause and Punitive Damages: Lessons from History,* 40 Vand.L.Rev. 1233, 1251 (1987).

The Magna Carta was a response to the frequent and occasionally abusive use of amercements by the King. "Magna Carta included several provisions placing limits on the circumstances under which a person could be amerced, and the amount of the amercement." *Browning-Ferris Industries, supra,* 492 U.S. at 270, 109 S.Ct. at 2918. In fact " . . . three chapters of Magna Carta were devoted to the rule that 'amercements' may not be excessive." *Solem v. Helm, supra,* 463 U.S. at 284, 103 S.Ct. at 3006. "The barons who forced John to agree to Magna Carta sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements as a source of royal revenue and as a weapon against enemies of the Crown." *Browning-Ferris Industries, supra,* 492 U.S. at 271, 109 S.Ct. at 2918.

Chapter 20 of Magna Carta mandated a weighing of the fault and provided for specific limits on amercements, as follows:

> "A Free-man shall not be amerced for a small fault; and for a great fault after the greatness thereof, saving to him his contenement; and a Merchant likewise, saving to him his Merchandise; and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy. And none of the said amerciaments shall be assessed, but by the oath of honest and lawful men of the vicinage. Earls and Barons shall not be amerced but by their Peers, and after the manner of their offense. No man of the Church shall be amerced after the quantity of his spiritual Benefice, but after his Lay-tenement, and after the quantity of his offense."

Browning-Ferris Industries, supra, 492 U.S. at 288-289, 109 S.Ct. at 2927 (O'Connor, concurring in part and dissenting in part), quoting 9 Hen. III, ch. 14 (1225). This Amercements Clause of Magna Carta limited the King's abusive use of amercements in four ways:

> . . . by requiring that one be amerced only for some genuine harm to the Crown; by requiring that the amount of the amercement be proportioned to the wrong; by requiring that the amercement not be so large as to deprive him of his livelihood; and by requiring that the amount of the amercement be fixed by one's peers, sworn to amerce only in a proportionate amount.

Id. 492 U.S. at 271, 109 S.Ct. at 2918. Thus, the concept of proportionality was at the heart of the Amercements Clause of Magna Carta.

The term "amercements" later became interchangeable with the term "fines":

> Fines originated in the 13th century as voluntary sums paid to the Crown to avoid an indefinite prison sentence for a common-law crime or to avoid royal displeasure. . . . The Crown gradually eliminated the voluntary nature of the fine by imposing indefinite sentences upon wrongdoers who effectively would be forced to pay the fine. *Once the fine was no longer voluntary, it became the equivalent of an amercement.* . . . Although in theory fines were voluntary while amercements were not, the purpose of the two penalties was equivalent, *and it is not surprising that in practice it became difficult to distinguish the two.*

Id. 492 U.S. at 289, 109 S.Ct. 2928 (O'Connor, concurring and dissenting) (emphasis added). "By the 17th century, fines had lost their original character of bargain and had replaced amercements as the preferred penal sanction. The word 'fine' took on its modern meaning, while the word 'amercement' dropped out of ordinary usage." *Id.* "In the 1680's the use of fines 'became even more excessive and partisan,' and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Id.* 492 U.S. at 267, 109 S.Ct. at 2916.

After James II fled England during the Glorious Revolution of 1688-1689, the House of Commons appointed a committee "to draft articles concerning essential laws and liberties that would be presented to William of Orange." *Id.* 492 U.S. at 290, 109 S.Ct. at 2928. "The group which drew up the 1689 Bill of Rights had firsthand experience; several had been subjected to heavy fines by the King's bench." *Id.* 492 U.S. at 267, 109 S.Ct. at 2916. The final draft of Article 10, which provided that "excessive Baile ought not to be required, nor excessive Fines imposed, nor cruel and unusual Punishments inflicted," was,

according to Blackstone, "only declaratory . . . of the old constitutional law." *Id.* 492 U.S. at 291, 109 S.Ct. at 2928 (O'Connor, concurring and dissenting), citing 4 Blackstone, Commentaries 372.

> Of course the only prohibition on excessive monetary penalties predating Article 10 was contained in Magna Carta. "Since it incorporated the earlier prohibition against excessive amercements – which could arise in civil settings – as well as other forms of punishment, [Article 10's limitation on excessive fines] cannot be limited to strictly criminal cases but extends to monetary sanctions imposed in both criminal and civil contexts." Note, at 1717. Because the word "amercement" had dropped out of ordinary usage by the late 17th century, it appears that the word "fine" in Article 10 was simply shorthand for all monetary penalties, "whether imposed by judge or jury, in both civil and criminal proceedings."

Id. 492 U.S. at 291, 109 S.Ct. at 2928-2929, (quoting *Massey*, at 1256).

The majority in *Browning-Ferris Industries, supra*, indicated that: "The Framers of our Bill of Rights were aware and took account of the abuses that led to the 1689 Bill of Rights." *Id.* 492 U.S. at 267, 109 S.Ct. at 2916:

> This history, when coupled with the fact that the accepted English definition of "fine" in 1689 appears to be identical to that in use in colonial America at the time of our Bill of Rights, seems to us clear support for reading our Excessive Fines Clause as limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends.

Id. When "the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they

also adopted the English principle of proportionality." *Solem v. Helm, supra,* 463 U.S. at 285-286, 103 S.Ct. at 3007:

> Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection. . . .

Id. 463 U.S. at 286, 103 S.Ct. at 3007. As the history of the English Bill of Rights of 1689 shows, that "same protection" encompassed civil, as well as criminal, proceedings brought by the Sovereign.

Furthermore, in the First Congress, though there "was little debate over the Eighth Amendment . . . and no discussion of the Excessive Fines Clause," consideration of the Eighth Amendment immediately followed consideration of the Fifth Amendment. *Browning-Ferris Industries, supra,* 492 U.S. at 294, 109 S.Ct. at 2930 (O'Connor, concurring and dissenting).

> After deciding to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to criminal proceedings, the Framers turned their attention to the Eighth Amendment. There were no proposals to limit that Amendment to criminal proceedings,. . . .

Id. One would think that if the Framers of the Constitution had intended to limit the Eighth Amendment to criminal proceedings, they could have as easily confined the benefits of the excessive fines clause to criminal proceedings.

The history of the Excessive Fines Clause of the Eighth Amendment argues for its application to forfeiture proceedings under 21 U.S.C. § 881(a)(4) and § 881(a)(7). The concept of "amercements" in Magna Carta and the concept of "fines" in Article 10 of the English Bill of

Rights of 1689 are akin to both civil and criminal forfeiture today. As this Court stated in *Ingraham v. Wright,* 430 U.S. 651, 670, n.39, 97 S.Ct. 1401, 1412 n.39 (1977), "[t]he applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation." But also, as noted by Justice McKenna in *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of Constitutions." *Id.* 217 U.S. at 373, 30 S.Ct. at 551. The "wider application" of the Excessive Fines Clause to civil forfeiture under 21 U.S.C. § 881(a)(4) and § 881(a)(7) has a solid basis in "its historical derivation." By looking "to the origins of the [Excessive Fines] Clause, and the purposes which directed its Framers," *see Browning-Ferris Industries, supra,* 492 U.S. at 264 n.4, 109 S.Ct. at 2914 n.4, it is clear that the Excessive Fines Clause should apply to the civil forfeiture of Richard Lyle Austin's Garretson Body Shop and his 1972 HMET mobile home; and with the application of the Eighth Amendment Excessive Fines Clause to this case comes the application of the principle of proportionality, which is the fiber that binds together the Eighth Amendment.

B.

Clearly "troubled" by a forfeiture that deprived Austin of his home and business – essentially all of his assets, the Court of Appeals nonetheless felt constrained from applying an Eighth Amendment proportionality analysis, because of the technical distinctions between *in rem* and *in personam* and the civil nature of the forfeiture action:

> We do not condone drug trafficking or any drug-related activities; nonetheless, we are troubled by the government's view that *any* property, whether it be a hobo's hovel or the Empire State building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction.
>
> * * *
>
> In this case it does appear that the government is exacting too high a penalty in relation to the offense committed, but we are limited by the technical legal distinctions regarding *in personam* and *in rem* actions, together with the clear court decisions that the Constitution does not require proportionality – at least, not in civil proceedings for the forfeiture of property.

United States v. One Parcel of Property Located at 508 Depot Street supra, 964 F.2d at 818. Petitioner contends, however, that an Eighth Amendment proportionality analysis is not precluded by this civil *in rem* label, on several alternate grounds: First, and most apposite, the text of the Excessive Fines Clause itself, when viewed along side the current scope and usage of forfeitures under 21 U.S.C. §§ 881(a)(4) & (7), strongly favors application of the Eighth Amendment to civil sanctions where the government stands to gain monetarily. Second, the *in rem* fiction should not bar application of an Excessive Fines proportionality analysis where, as here, civil forfeitures are at least quasi-criminal in nature. Finally, applying the Court's analysis in *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989), the forfeitures of Austin's mobile home and body shop under sections 881(a)(4) & (7) are, in effect, punishment, particularly to the extent that they exceed any remedial goals of the statute.

1.

The Excessive Fines Clause is applicable to civil as well as criminal government sanctions.

Both the historical context of amercements and fines and the Court's current pronouncements concerning civil actions demonstrate that the Excessive Fines Clause of the Eighth Amendment should apply to civil forfeiture actions brought by the government.

As the historical outline above suggests, amercements were an " 'all purpose royal penalty' " used as both a criminal and a civil sanction for offending the Crown. *See, Browning-Ferris Industries, supra,* 492 U.S. at 269, 288, 109 S.Ct at 2917, 2927. Magna Carta's limits on the use of excessive amercements are historically traceable through the English Bill of Rights to the Eighth Amendment, although the term "amercement" gradually fell out of usage and was replaced with the term "fine":

> Because the word "amercement" had dropped out of ordinary usage by the late 17th century, it appears that the word "fine" in Article 10 was simply shorthand for all monetary penalties, "whether imposed by judge or jury, in both civil and criminal proceedings." Massey, at 1256. Indeed, three months after the adoption of the English Bill of Rights, the House of Lords reversed a fine by referring to Magna Carta, and not to Article 10. *See Earl of Devonshire's case,* 11 State Tr. 1367, 1372 (H.L. 1689) (ruling that "fine" of 30,000 pounds for striking another was "excessive and exorbitant, against Magna Carta, the common right of the subject, and the law of the land.").

Id. 492 U.S. at 291, 109 S.Ct. at 2928-29 (O'Connor, concurring in part and dissenting in part). After tracing this history, Justice O'Connor concluded that there is a strong historical link between the Amendment and civil actions:

"If anything is apparent from the history set forth above, it is that a monetary penalty in England could be excessive, and that there is a strong line between amercements, which were assessed in civil cases, and fines. Cf. *Solem*, 463 U.S., at 284, n.8, 103 S.Ct., at 3006, n.8 (an 'amercement was similar to a modern-day fine')". *Id.* 492 U.S. at 295, 109 S.Ct. at 2930.

Taking the analysis further, Justice O'Connor notes that the word "fine" currently "comprehends a forfeiture or penalty recoverable in a civil action. See Black's Law Dictionary 569 (5th ed. 1979); Webster's Third New International dictionary 852 (1971)," 492 U.S. at 297, and that early court authority around the time of the enactment of the Eighth Amendment lends historical support for this meaning:

> The Massachusetts supreme Judicial Court held that the word "fine" in a statute meant "forfeitures and penalties recoverable in civil actions, as well as pecuniary punishments inflicted by sentence." *Hanscomb v. Russell*, 77 Mass. 373, 375 (1858). It explained that "the word 'fine' has other meanings" besides pecuniary penalties "inflicted by sentence of a court in the exercise of criminal jurisdiction . . . as appears by most of the dictionaries of our language, where it is defined not only as a pecuniary punishment, but also as a forfeiture, a penalty, [etc.]" Id., at 374-375. The Iowa Supreme Court had the following to say about fines:
>
> "The terms, fine, forfeiture, and penalty, are often used loosely, and even confusedly. . . . A fine is a pecuniary penalty, and is commonly (perhaps always) to be collected by suit in *some* form. A 'forfeiture' is a penalty by which one loses his rights and interest in his property." *Gosselink v. Campbell*, 4 Iowa 296, 300 (1856) (emphasis added).

Id. 492 U.S. at 296-297, 109 S.Ct. at 2931-32.

While the majority in *Browning-Ferris Industries* leaves open the issue of whether the Eighth Amendment applies to civil fines or forfeitures assessed by government action (as non-essential to the holding in that case), it at least suggested that such scrutiny may be warranted. For example, the Court specifically noted that "the government of Vermont has not taken a positive step to punish, as it most obviously does in the criminal context, *nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual.*" *Id.* 492 U.S. at 275, 109 S.Ct. at 2920 (emphasis added). In the accompanying footnote, note 21, the Court further cited *United States v. Halper*, as holding that "the Double Jeopardy Clause of the Fifth Amendment places limits on the amounts the Federal Government may recover in a civil action, after the defendant already has been punished through the criminal process." *Id.* Presumably, then, such a government enforced payment or forfeiture for revenue enhancement or disablement may implicate the Eighth Amendment.

More recently, Justice Scalia, without discussing the civil/criminal distinction, suggested in a footnote to a Cruel and Unusual punishment analysis that it makes sense to scrutinize governmental action more closely under the Excessive Fines Clause, because the State stands to benefit. *Harmelin v. Michigan*, 111 S.Ct. 2680, 2693 n.9 (1991), citing, by way of analogy, *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25-26, 97 S.Ct 1505, 1519-1520, (1977) and *Perry v. United States*, 294 U.S. 330, 350-351, 55 S.Ct. 432, 435 (1935). In *United States Trust Co. of New York, supra*, the Court similarly noted, in the context of the Constitution's Contract Clause, that "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, *complete deference to a*

legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." United States Trust Co. of New York v. New Jersey, supra, 431 U.S. at 25-26. (emphasis added).

Indeed, "[i]n an eight month period during 1989, for example, the United States Attorney's office in the Eastern District of New York collected $37,000,000 from civil forfeitures. This amount is four times what it cost to run that office during that period." Pratt and Petersen, *Civil Forfeiture In The Second Circuit,* 65 St. John's Law Review, 653, 671 (1991), (citing N.Y.L.J. July 27, 1989 at 1, col.5 & 21, col.5). It has also been reported that "[s]ince 1985, the federal government has harvested $2.6 billion this way; it made 35,295 seizures in 1991, up 18 times in six years." *See,* "Where the Innocent Lose," *Newsweek,* January 4, 1993, p. 42.

In the case of forfeitures under 21 U.S.C. §§ 881(a)(4) & (7), the potential for government abuse is clear. Not only is there a financial incentive for the government to expand its grasp for monetary gain, but the procedural aspects of this forfeiture law actually assist the government action beyond the scope of even traditional civil actions. The forfeiture action under § 881 is nominally against the property, which may be seized without notice to the claimant and before any judicial proceeding. 21 U.S.C. § 881(b). The government then need only prove its case by probable cause, which can be based on circumstantial and otherwise inadmissible hearsay evidence. After that minimal showing, the burden then shifts to the claimant to prove either that the factual predicates for forfeiture have not been met – i.e. that the property was not used in connection with illegal activity, or that he qualifies for the innocent owner defense. Establishing either of these limited defenses has been noted by commentators to be fraught with difficulties. *See,* Pratt and

Petersen, *Civil Forfeiture In The Second Circuit,* 65 St. John's L. Rev. 653, 665-668 (1991). "In other words, the government can succeed without satisfying the preponderance of the evidence standard applicable in most civil suits." *Id.* at 665. With the broad scope of the permitted forfeiture, the government can easily strip one of all his property without the check of even common protections afforded to private parties in a civil context.

Thus, based on a history which strongly suggests that the Excessive Fines Clause applies to government imposed sanctions, civil as well as criminal, and the fact that the government in this case has both the financial incentive for and the procedural means to accomplish widespread abuse through forfeiture under § 881, the Court should hold that the Excessive Fines Clause of the Eighth Amendment applies to this sanction.

2.

The *in rem/in personam* distinction should not bar the application of the Excessive Fines Clause of the Eighth Amendment to forfeiture proceedings under 21 U.S.C. § 881(a)(4) and § 881(a)(7).

The *in rem/in personam* distinction, as applied to 21 U.S.C. §§ 881(a)(4) & (7), should not bar Petitioner from asserting a violation of his rights under the Excessive Fines Clause of the Eighth Amendment. Although the *in rem* doctrine has a long history in English and American jurisprudence, and though it may continue to serve some valid procedural need in reaching the contraband and illicit proceeds from drug trade, the fiction of placing the blame on the property in these two sections is so broad in scope and so intimately tied to provisions relating to criminal enterprise that the doctrine should not be allowed to impair Petitioner's individual right to be free from excessive fines.

In *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246 (1965), the Court applied the Fourth Amendment to an *in rem*, civil forfeiture that involved property not intrinsically illegal in character – i.e. a car – even though "it" facilitated the illegal importing of liquor not bearing state tax seals. Citing *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886) for the proposition that a forfeiture proceeding is quasi-criminal in character, since "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law," (*id.* at 380 U.S. 700), the Court declined to restrict an application of the Fourth Amendment based on the *in rem* fiction:

> This Court in *Boyd v. United States, supra*, 116 U.S. at 638, 29 L.Ed. at 753, rejected any argument that the technical character of a forfeiture as an *in rem* proceeding against the goods had any effect on the right of the owner of the goods to assert as a defense violations of his constitutional rights. The Court stated:
>
> > "[A]lthough the owner of goods, sought to be forfeited by a proceeding *in rem*, is not the nominal party, he is, nevertheless, the substantial party to the suit; he certainly is so, after making claim and defense; and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense."

Id. at 701, n.11. Similarly, in *United States v. United States Coin and Currency*, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d (1971), the Court rebuffed the government's argument that the Fifth Amendment privilege against self incrimination should not apply in an *in rem* civil proceeding where the guilt or innocence of the actual owner of the

money may be irrelevant. Acknowledging, somewhat disparagingly, this "remarkable" fiction, the Court examined the forfeiture provision in its overall context:

> For the broad language of [26 U.S.C.] § 7302 cannot be understood without considering the terms of the other statutes which regulate forfeiture proceedings. An express statutory provision permits the innocent owner to prove to the Secretary of the Treasury that the "forfeiture was incurred without willful negligence or without any intention on the part of the petitioner . . . to violate the law. . . . " 19 USC § 1618.
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> • • •
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> When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.

Id. at 401 U.S. 721 (footnotes 8 & 9 omitted). Thus, the whole statutory scheme is relevant to this inquiry.

Like the internal revenue forfeiture provisions in *United States Coin and Currency, supra*, the forfeiture provisions of 21 U.S.C. §§ 881(a)(4) & (7) have innocent owner exceptions. Section 881(a)(7) goes even further, tying the forfeiture of real property to "a violation of this title punishable by more than one year's imprisonment." Moreover, section 881(d) provides that the provisions of law relating to "the remission or mitigation of such forfeitures" and "the compromise of claims shall apply to seizures and forfeitures incurred . . . under any of the provisions of this title. . . . " Finally, forfeiture under both §§ 881(a)(4) & (7) are predicated on violations of the Controlled Substances Act. Title II of Pub. L. No. 91-513, 84 Stat. 1242 (1970).

Thus, it is "manifest" here, as it was in *United States Coin and Currency*, that one real objective of these sections

– beyond the fiction that "the property is guilty of wrongdoing" – is to impose a penalty upon those who are significantly involved in a criminal enterprise. See also, the legislative pronouncements on § 881, *infra*, at I.B.3. The Eighth Circuit implicitly recognized this truth in Austin's case (as have other courts of appeal troubled by the broad scope of forfeitures under this section), when it stated that "it does appear that *the government is exacting too high a penalty in relation to the offense committed.*" *United States v. One Parcel of Property, supra,* 964 F.2d at 818 (emphasis added). Perhaps the procedural advantages of *in rem* actions serve a purpose; perhaps not all Constitutional protections applicable to a criminal case should apply. Given the history of the Excessive Fines Clause and its protections against the disproportionate forfeiture of an individual's property, Petitioner contends only that the Court should apply this clause to civil forfeiture actions that are quasi-criminal in nature, as it has under the fourth and fifth amendment cases of *Boyd, One 1958 Plymouth Sedan, and U.S. Coin & Currency, supra.*

Petitioner recognizes the apparent difficulties that some circuit courts of appeal have had in fully squaring this analysis with the Court's holding in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080 (1974). However, *Calero-Toledo* did not overrule *Coin & Currency* but, rather, distinguished it factually. *See Calero-Toledo,* 416 U.S. at 668, 94 S.Ct. at 2904. The Court in *Coin & Currency* construed the statutes as a whole as containing a type of innocent owner exception that limited the forfeiture's application where the "innocent owner" could "prove to the Secretary of the Treasury" that he did not willfully or intentionally violate the law. *Coin & Currency, supra,* 401 U.S. at 721. The statute in *Calero-Toledo* contained no such exception, nor did 21 U.S.C. § 881(a)(4)

in 1974. In 1984, however, Congress added the subparagraph (C) "innocent owner" exception to § 881(a)(4); at the same time, it added paragraph 881(a)(7), with similar innocent owner wording, plus the tie, in (a)(7), to "a violation punishable by more than one year imprisonment." Petitioner contends that the holding in *Coin & Currency, supra,* is the better law to be applied to the Excessive Fines Clause analysis, under the statutory scheme involved here. At least the Second Circuit appears to agree:

> In evaluating whether a forfeiture under 881(a)(7) serves its ostensible goals, we focus upon the effects on the claimant who has violated the statute, despite the fact that the forfeiture actions are brought *in rem. See Livonia Road,* 889 F.2d at 1270. *See also U.S. v. Huber,* 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied,* 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980) (for Eighth Amendment purposes, "there is no substantial difference between an *in rem* proceeding and a[n *in personam* criminal] forfeiture proceeding brought directly against the owner;) *cf. United States v. U.S. Coin & Currency,* 401 U.S. 715, 718, 91 S.Ct. 1041, 1043, 28 L.Ed.2d 434 (1971). Where an individual has suffered severe penalties in an *in rem* forfeiture proceeding, it is particularly appropriate to address the substance of that proceeding. *See United States v. One Leong Chinese Merchants Ass'n Bldg.,* 918 F.2d 1289, 1299 (7th Cir. 1990) (Cudahy, J., concurring); *United States v. Premises Known as 3639-2nd St., N.E.,* 869 F.2d at 1098 (Arnold, J., concurring).

United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, 954 F.2d 29, 36 (2d Cir. 1992).

3.

The civil forfeiture action against Petitioner constitutes punishment, since the effect of forfeiture on Petitioner's property also serves a retributive or deterrent purpose.

Alternately, notwithstanding its "civil" denomination, application of sections 881(a)(4) & (7) was punitive as applied to Petitioner in this case, entitling him to Eighth Amendment protection. Although section 881 was clearly established as a civil remedy, the legislature's label is not itself determinative, since "civil proceedings may advance punishment as well as remedial goals. . . ." *United States v. Halper, supra,* 490 U.S. at 448, 109 S.Ct. at 1901. The Court in *Halper* stressed that "a particularized assessment of the specific penalty imposed and the purposes that the penalty may fairly be said to serve" is necessary to determine the true nature of the statute:

> Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.
>
> These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. See, *e.g., Kennedy v. Mendoza-Martinez,* 372 U.S. 44, 168, 83 S.Ct. 554, 567, 9 L.Ed.2d 644 (1963) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell v. Wolfish,* 441 U.S. 520, 539, n.20, 99 S.Ct. 1861, 1874, n.20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. Cf. *Mendoza-Martinez,* 372 U.S., at 169, 83 S.Ct., at 568 (whether sanction appears excessive in relation to its nonpunitive purpose is relevant to determination of whether sanction is civil or criminal).

Id. 492 U.S. at 448, 109 S.Ct. at 1901-02. Applying this practical approach, along with the objective factors that *Mendoza-Martinez*[1] bears on the inquiry, the statute as applied here also clearly served retributive and deterrent ends.

Congress expressly recognized the "penal nature" of this forfeiture statute in 1978 when it added the "proceeds forfeiture" amendment codified as section 881(a)(6): *"Due to the penal nature of forfeiture statutes,* it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent." Joint Explanatory Statement of Titles II and III, reprinted in 1978 U.S. Code Cong. & Adm. News 9518, 9522 (emphasis added). In 1984, Congress even more clearly stated its punitive goal of deterrence with the enactment of section 881(a)(7):

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[1] The Court set forth seven factors in *Kennedy v. Mendoza-Martinez,* 372 U.S. 44, 168-69 (1963), that bear on the question of whether the enactment is deemed a punishment:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry. . . .

Id. (footnotes omitted).

> Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marijuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, *even though its use was indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.*

S Rep No 225 98th Cong 1st Sess 195, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3378 (emphasis added). Finally, in adding 881(a)(7), Congress expressly recognized that the "traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish" the drug trade. "Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made." S Rep No 225, reprinted in 1984 U.S. Code Cong. & Admin News 3182, 3374.

In short, the punishment related concept of disabling, penalizing, and deterring are prevalent throughout the legislative discussion of the civil forfeiture provisions in section 881, particularly 881(a)(7). The express purpose appears generally aimed at inflicting an affirmative disability and deterring those individuals who are connected with drug activity.[2]

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[2] One commentator has noted that "even the Justice Department acknowledges that the 'purpose of civil forfeiture is . . . to *deter and punish criminal activity.*' ", citing 11 The Department of Justice Manual B-25 (Prentice-Hall Law & Business Supp. 1988-2), as stating: "Therefore, even if the property is worth little, its forfeiture may nonetheless serve legitimate and overriding law enforcement objectives by depriving the wrongdoer of its use and availability." *See,* Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment,* 89 Mich. L.Rev. 165, 189 (1990).

The intrinsic connection between forfeiture under sections 881(a)(4) and 881(a)(7) and criminal activity is also evident, particularly with respect to 881(a)(7). Forfeiture of conveyances under 881(a)(4) is expressly tied to controlled substances or material, products and equipment relating to controlled substances in violation of the criminal drug provisions of the Controlled Substances Act; section 881(a)(7) is similarly tied to violation of that criminal act. Although forfeitures under these sections can occur without an offense being charged, real property under 881(a)(7) can be forfeited only if it facilitates the commission of a violation of drug laws "punishable by more than one year's imprisonment." Moreover, these sections include limited, innocent owner provisions that would be seemingly anomalous to truly traditional civil proceedings. Finally, section 881(d) incorporates by reference administrative procedures for remission and mitigation of such forfeitures. Based on these connections to criminal acts, it appears that "[t]he main thrust of the civil forfeiture statutes is to attack or punish criminal behavior, not merely to act as a civil penalty for tortious conduct."[3]

Against this general background, the analysis must refocus, per *Halper*, on the nature of the sanction and the effect of the forfeiture in this particular case, to see if the sanction solely serves a remedial purpose or if it also serves either the retributive or deterrent purposes of punishment. In this case, there is no record that the federal government had any interest in Petitioner before

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[3] Note, *supra*, note 2, at 189.

his arrest on state charges. South Dakota state authorities investigated, arrested, charged, and ultimately punished Austin with imprisonment. The United State's remedial interest in interdicting drug activity would surely seem attenuated in this case, where state authorities had already accomplished that goal. On these facts it is difficult to conceive of any overriding interest of the federal government besides financial gain, retribution or deterrence. Even the recognized remedial goal of making the United States whole for the costs and expenses of pursuing Austin were presumably lessened because of the government's abbreviated involvement in his case. Consequently, at least on the instant record, this forfeiture cannot be fairly characterized as necessarily accomplishing that particularized remedial purpose.

Moreover, Austin's mobile home and the body shop were not in themselves contraband. Nor is there any indication in the record that the properties were purchased with illegitimate drug profits. Consequently, the forfeitures here do not solely serve the remedial goal of eliminating such illegal substances, products, materials, and equipment from commerce or of eliminating the profit of ill gotten gains. By the same token, the all-encompassing remedial purpose of ridding this country of the drug trafficking and addiction, while laudable, would apply analogously and generally to all crimes or social problems, and it is not helpful in the considered analysis of whether or not a sanction is truly, in effect, remedial or punitive.

The effect of the forfeiture against Austin "cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes." *Halper, supra*, 490 U.S. at 448, 109 S.Ct. at 1902. Effectually, the forfeiture of all of Austin's legitimately acquired interests in his home and

livelihood, though meager they were, was his economic ruin. Whether this served a retributive or a deterrent purpose is academic. Under the circumstances of this case, however, the forfeiture applied to Austin assumed the quality of punishment.

II.

WHEN A SHOWING IS MADE THAT FORFEITURE OF THE GARRETSON BODY SHOP AND THE 1972 HMET MOBILE HOME, OWNED BY RICHARD LYLE AUSTIN IS EXCESSIVE, THE GOVERNMENT MUST THEN SHOW THAT THE INTEREST ORDERED FORFEITED IS NOT SO GROSSLY DISPROPORTIONATE TO THE OFFENSE COMMITTED BY RICHARD LYLE AUSTIN AS TO VIOLATE THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

A.

The Excessive Fines Clause of the Eighth Amendment, rather than the Cruel and Unusual Punishments Clause, provides a clearer basis for proportionality analysis in this civil forfeiture proceeding.

First, it would appear from the Court's more recent pronouncements that the Excessive Fines Clause affords a clearer basis for a proportionality analysis of the civil forfeitures under consideration here, than does the Cruel and Unusual Punishments Clause. Whether one adopts Justice Scalia's discussion of the origin of the Cruel and Unusual Punishments Clause, set forth in *Harmelin v. Michigan*, 111 S.Ct. 2680, 2687-2696; or whether one adheres to the narrow proportionality principle enunciated in Justice Kennedy's Opinion, concurring in part and concurring in the Judgment, *Harmelin, supra*, 111 S.Ct. 2702-2709; or even whether one agrees with Justice White's dissent in *Harmelin v. Michigan*, 111 S.Ct. 2709-2719, and with the proportionality test set forth in

Solem v. Helm, supra, 463 U.S. at 290-292, 103 S.Ct. 3001, 3010-3011, it seems clear that the Cruel and Unusual Punishment Clause is more applicable to methods or modes of punishment or lengthy terms of incarceration, than it is to the seizure or forfeiture of property. It seems also true that the history of the Excessive Fines Clause and the concept of proportionality associated with it makes it the more appropriate clause in the Eighth Amendment to apply to the forfeiture of Petitioner's property under 21 U.S.C.§ 881(a)(4) and (a)(7). The "excessive" language of the clause itself suggests a proportionality analysis. Moreover, one cogent reason for applying the excessive fines proportionality analysis to civil forfeiture cases is the unique financial incentive for government abuse, elucidated in Justice Scalia's Opinion in *Harmelin v. Michigan, supra*, 111 S.Ct. at 2693:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other Constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

Id. at 9. Thus, although the lower courts have often discussed forfeiture cases without clearly distinguishing between application of the two clauses, Petitioner's argument focuses primarily on the Excessive Fines Clause and its specific protections in this case.

Second, the standards for analyzing this protection have also been diverse and confusing in the lower courts. Petitioner argues that, in framing an objective test that would assist the judiciary both in focusing on the criminal activity that Congress strongly wished to sanction

under 21 U.S.C. § 881, and also in protecting individuals from Eighth Amendment abuses under the Excessive Fines Clause, several prior court cases are instructive as to the threshold criteria. However, for the reasons set forth below, those cases should not be determinative of the final standard. In arriving at the ultimate factors to employ in such a proportionality analysis, one should also account for the historical perspective of such fundamentals as the Magna Carta and the practical tests already routinely applied by the trial courts.

B.

A review of three recent circuit court of appeals decisions in the Second, Third, and Ninth Circuits, that attempt to apply an Eighth Amendment test, is instructive. The Second Circuit Court of Appeals in a civil forfeiture case, and the Ninth Circuit Court of Appeals in a criminal forfeiture case, have fashioned proportionality analyses using the three *Solem* factors of "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for a commission of the same crime in other jurisdictions." *Solem v. Helm, supra*, 463 U.S. 277, 290-292, 103 S.Ct. 3001, 3010-3011, 77 L.Ed.2d 637 (1983). The Third Circuit noted that the *Solem* standard may have a more restricted application after *Harmelin v. Michigan*, and suggested additional "helpful inquires" in a proportionality analysis.

1.

The Second Circuit Court of Appeals applied the *Halper* threshold analysis to a civil forfeiture action and concluded that the forfeiture constituted punishment within the meaning of the Eighth Amendment and that the sanction was excessive.

The Second Circuit Court of Appeals applied the Eighth Amendment to civil forfeiture under 21 U.S.C. § 881(a)(7) in *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York*, 954 F.2d 29 (2nd Cir. 1992). In that case, the appellant appealed from a judgment of forfeiture under 21 U.S.C. § 881(a)(7), which deprived him of his residence. The evidence showed that appellant had twice sold cocaine inside his condominium to a confidential informant. Appellant later pled guilty to attempted criminal sale of a controlled substance; and the government commenced forfeiture proceedings pursuant to 21 U.S.C. § 881(a)(7) against his personal residence. The District Court granted the government's cross motion for summary judgment, and judgment of forfeiture was entered. *Id.* 954 F.2d at 32-33. The Second Circuit Court of Appeals read *Halper* to apply to civil forfeitures in certain circumstances: "Forfeitures that are overwhelmingly disproportionate to the value of the offense must be classified as punishment unless the forfeitures are shown to serve articulated, legitimate civil purposes." *Id.*

The Court then held that a forfeiture under 21 U.S.C. § 881(a)(7) would not be presumed punitive where the seized property "had been used *substantially* to accomplish illegal purposes, so that the property itself can be said to be 'culpable' or an instrumentality of crime." *Id.* 954 F.2d at 36 (emphasis added). The Court stated that,

"[w]here the seized property is not itself an instrumentality of crime, however, *and* its total value is overwhelmingly disproportionate to the value of controlled substances involved in the statutory violation, there is a rebuttable presumption that the forfeiture is punitive in nature." *Id.* Since the value of the appellant's interest in the residence was "close to three hundred times the value of cocaine sold inside it," the Court found as a matter of law "that the forfeiture is overwhelmingly disproportionate compared to the value of the relevant drug transactions, and that therefore a rebuttable presumption that the forfeiture is punitive in nature is created." *Id.* 954 F.2d at 37.

In a footnote, the Court indicated that appellant appeared to mention, but did not press, the possibility that the Excessive Fines Clause might apply to sanctions purely civil in nature. The Court Accordingly declined to address that issue. *Id.* 954 F.2d at 38, n.3. Regarding Excessive Fines Clause applicability, the Court stated that, ". . . the Supreme Court has provided no guidance, except to observe that fines must be closely scrutinized because they benefit the government." *Id.* 954 F.2d at 39. Nevertheless, the Court of Appeals concluded in dicta that it did not need to decide at exactly what point a fine or forfeiture might violate the Excessive Fines Clause, since the forfeiture in that case would be proper wherever such a line could be drawn. *Id.* 954 F.2d at 39.

The importance of the Second Circuit case is that it applied the *Halper* threshold analysis to a civil forfeiture action and concludes that the forfeiture constitutes punishment within the meaning of the Eighth Amendment and that the sanction was excessive. Also relevant to Petitioner's argument is the statement by the Court of Appeals that:

> While we are extremely sympathetic to the need to address our nation's serious narcotics problems, we do not believe that a disproportionately large forfeiture can be reasonably justified as a civil fine as opposed to punishment by placing full responsibility for the "war on drugs" on the shoulders of every individual claimant. This is particularly so where the individual claimant's violations are relatively minor.

Id. 954 F.2d at 37.

The case is not particularly instructive, however, to the Excessive Fines Clause analysis. The Second Circuit Court of Appeals was not pressed with an argument that the Excessive Fines Clause applies to civil forfeitures under 21 U.S.C. § 881(a)(7). Therefore, its ultimate holding should not be applied to Petitioner's case; and its comments regarding the Excessive Fines Clause are merely dicta. Further, the Court of Appeals applied the criteria or factors from *Solem v. Helm*, which are more appropriately applied to punishments under the Cruel and Unusual Punishments Clause of the Eighth Amendment. Moreover, the Court did not consider the historical background of the Excessive Fines Clause and its connection with the Amercements Chapter of Magna Carta.

2.

The Ninth Circuit Court of Appeals has applied a proportionality analysis to criminal forfeiture cases, with some relevant factors to this civil forfeiture case.

The criminal forfeiture cases under the Racketeer Influences and Corrupt Organizations Act, 18 U.S.C. §§ 1969 et seq. (1982) (RICO) are also instructive as to a proportionality analysis in civil forfeiture cases. In *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987), the Ninth Circuit Court of Appeals held that forfeiture under § 1963(a) of RICO "is clearly 'punishment' as that term is

used in the Eighth Amendment." *Id.* 817 F.2d at 1413. The *Busher* Court held that ". . . where, as here, plaintiff makes a prima facie showing that the forfeiture may be excessive, the District Court must make a determination, based upon appropriate findings, that the interest ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Eighth Amendment." *Id.* 817 F.2d at 1415. The Court of Appeals indicated that the District Court did not take "these constitutional considerations into account in fashioning its forfeiture order," and the Court of Appeals remanded the case to the District Court to do so. *Id.* The Court then indicated as follows:

> Because the Eighth Amendment, as interpreted in *Solem*, embodies fluid concepts that vary in application with the circumstances of each case, there is relatively little guidance we can give the District Court in making its determination. We do, however, offer the following observations.
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> The District Court must, consistent with *Solem* consider (1) the harshness of the penalty in light of the gravity of the offense; (2) sentences imposed for other offenses in the federal system; and (3) sentences imposed for the same or similar offenses in other jurisdictions. 463 U.S. at 292, 103 S.Ct. at 3010. In comparing the penalty imposed to the gravity of the offense, the District Court may consider the circumstances surrounding the defendant's criminal conduct. . . . More particularly, *Solem* noted that, in considering the gravity of the offense, a court should look both at the harm suffered by the victim and the defendant's culpability. 463 U.S. at 292, 103 S.Ct. at 3010.

Id. The Court also stated that the District Court should take into account the magnitude of the harm caused by

defendant's conduct, "the dollar volume of the loss caused, whether physical harm to persons was inflicted, threatened or risked, or whether the crime had severe collateral consequences, *e.g.*, drug addiction. . . . In addition, the Court may consider the benefit reaped by the convicted defendant." *Id.*

Referring again to *Solem v. Helm, supra*, the Court of Appeals said that the defendant's state of mind and his motive in committing the crime should be considered with regard to the defendant's culpability. *Id.* The Court of Appeals continued:

> In the context of RICO, the Court may consider the degree to which the enterprise operated by the defendant is infected by criminal conduct. The Court should be reluctant to order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income. Conversely, if illegal activity accounts for almost all of an enterprise's activity, or almost entirely with ill-gotten funds, it would not normally violate the Eighth Amendment to order forfeiture of all of defendant's interest in that enterprise.

Id. at 1415-16.

The Court of Appeals instructed the District Court that if, on remand of the case, the District Court found that the forfeiture was so disproportionate to the offense as to violate the Eighth Amendment, then "it must limit the forfeiture to such portion of the interest as it deems consistent with these principles; or it may condition the forfeiture upon payment of such sum or relinquishment of such other property as seems just under the circumstances; or it may limit or eliminate other punishment it would otherwise impose so as to bring the total sanction within Constitutional boundaries." *Id.* at 1416.

Thus, while the Ninth Circuit Court of Appeals in *Busher* recognized the *Solem* criteria, it essentially expanded on these factors and introduced several additional specific inquiries in its proportionality analysis under the Eighth Amendment. Despite the criminal forfeiture nature of *Busher*, many of the factors set forth therein could also apply to a proportionality analysis of civil forfeiture under the Excessive Fines Clause of the Eighth Amendment.

3.

The Third Circuit Court of Appeals has also applied a proportionality analysis to criminal forfeiture proceedings.

In the recent case of *United States of America v. Michael Sarbello*, No. 91-5327, 1993 U.S. App. LEXIS 1553 (1993), (filed on February 2, 1993), another RICO case, the Third Circuit Court of Appeals held that the District Court "may reduce the statutory penalty, a mandatory 100% statutory criminal forfeiture, in order to conform to the Eighth Amendment." The Court also held that *Sarbello* established a prima facie showing of an Eighth Amendment infringement, justifying a remand for "a more than summary finding as to whether the forfeiture provision of the statute as applied to *Sarbello's* interest in the RICO enterprise is either an unconstitutionally 'cruel and unusual punishment' or an 'excessive fine.' " 1993 U.S. App. LEXIS 1553 (1993), p. 3. The Third Circuit Court of Appeals also referred to *Solem v. Helm, supra*, and the three objective factors which guide Eighth Amendment review. *Id.* pp. 9-10. The Court indicated, however, that the *Solem* standard "was placed in question by the Court's recent decision in *Harmelin v. Michigan*, 111 S.Ct.

2680 (1991)". *Id.* p. 10. Nevertheless, the Court held that "the Eighth Amendment requires that a criminal RICO forfeiture order be justly proportioned to the charged offense." *Id.* p. 11. The Court of Appeals then set forth factors that the District Court should consider in its proportionality analysis:

> We note that a district court's proportionality analysis, while it will not in every case be extensive or encompass the three factors set forth in *Solem*, must necessarily accommodate the facts of the case and weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach, against the severity of the criminal sanction. Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability, and, of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct. . . . The language of the Eighth Amendment demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime.

Id. p. 12. The Court held that, "[u]pon a prima facie showing of gross disproportionality by the defendant, the Eighth Amendment requires more than a conclusory finding that 100% forfeiture is within constitutional limits." *Id.* p. 13. Because the District Court did not examine the factors essential to a proportionality analysis, the Court of Appeals remanded the issue for a proportionality analysis in keeping with its opinion. *Id.*

4.

Federal District Courts traditionally use a case-by-case proportionality analysis in assessing fines and setting bail.

These cases show to some extent the lower courts' reluctance to rely solely on the three factors of the *Solem* test. All three seemingly applied some form of the first factor, comparing the gravity of the offense and the harshness of the penalty. However, the second two factors have an anomalous application to forfeiture cases, particularly in the civil context, since total forfeitures of all of one's property, unlike specific punishments tied to specific crimes, can occur whether one gram of a controlled substance is involved or a ton. Thus, while some proportionality is arguably inherent in sentencing, little appears to be involved in the forfeitures under statutes such as § 881. Consequently, these courts developed other factors to use in a case by case analysis.

Addressing the standards set forth in *Solem v. Helm, supra*, and as applied to the civil forfeiture arena in *U.S. v. Certain Real Property and Premises, supra*, as one commentator said:

> . . . Because section 881 authorizes forfeiture in even the most minimal cases, the factors of individual cases should be weighed.
>
> Case-by-case analysis of forfeitures would follow the requirements of the excessive fines clause. While the cruel and unusual punishment clause may seem, on its face, focused on specific types on punishments that can be identified in the abstract, the excessive fines clause seems to require considering each case individually. An absolute rule, that all fines over a certain dollar amount are excessive would make little sense. Rather, "excessive" depends upon the context of a certain case.

Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 Mich. L. Rev., 165, 206 (1990). As Mr. Speta notes in this article, the lower courts traditionally use a case-by-case weighing in many similar areas, such as in assessing fines and in setting bail. For example, the federal district courts use individualized factors in deciding a proper sentence.[4]

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[4] *Cf.* 18 U.S.C. § 3572(a) (1988), which reads in part as follows:

Imposition of a sentence of fine and related matters

(a) Factors to be considered. – In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a) –

(1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person . . . that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

* * *

18 U.S.C. § 3553(a) (1988) provides:

The court in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

Moreover, when preventive detention is not an issue, "courts follow the factor analysis described by Congress in setting bail. These factors have been held to protect against the imposition of excessive fines." *Id.* at 207-208 (footnotes omitted).

5.

A proportionality analysis should not overlook the amercements clause of Magna Carta.

In applying a proportionality analysis, under the Eighth Amendment Excessive Fines Clause, to Petitioner's case, this Court should not overlook the earliest historical source of the Excessive Fines Clause, namely, Magna Carta. The amercements clause of Magna Carta provided that a "Free-man shall not be amerced for a small fault; and for a great fault after the greatness thereof, saving to him his contentment; and a Merchant likewise, saving to him his Merchandise; and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy." Chapter 20 of Magna Carta, 9 Hen.III, CH. 14 (1225). The term "contentment" means "a man's countenance or credit, which he has together with, and by reason of, his freehold; or that which is necessary for the support or maintenance of men, agreeably to their several qualities or states of life." *Blacks Law Dictionary*, (fifth edition) (1979). The term "wainage" meant, in Old English Law, "the team and

---

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant;

* * *

instruments of husbandry belonging to a countryman, and especially to a villein who was required to perform agriculture services." *Id.* The amercements clause of Magna Carta stands for the rule that the amount of the amercement should be proportioned to the wrong, and that it should not be so large as to deprive the "Free-man", "Merchant", or "villain" or his livelihood or means to earn a living; and whether the amercement be against a "Free-man", "Merchant", "villain", "Earl", "Baron", or "man of the Church", it must be in a proportionate amount. *See Browning-Ferris Industries, supra.*

The Court should also consider, as described at length above, the historical development of the proportionality analysis in Eighth Amendment jurisprudence, from Magna Carta, through the English Bill of Rights of 1689, to Article I, § 9 of the Virginia Declaration of rights, to the Eighth Amendment and its Excessive Fines Clause.

6.

The Court should adopt a two-pronged analysis in applying the Excessive Fines Clause to civil forfeiture cases under 21 U.S.C. §§ 881(a)(4) and (7), in order to determine whether the forfeiture violates the Eighth Amendment.

Based on the above discussion, Petitioner contends that the Court should use the following factors in applying the Excessive Fines Clause to the forfeiture in this case, under 21 U.S.C. §§ 881(a)(4) & (7):

> A *prima facie* or threshold determination that the forfeiture is excessive shall be established if:
>
> 1. the value of the property seized is excessive compared to the value of the controlled substances involved in the statutory violation; and,

> 2. the value of the property seized is excessive relative to the financial condition of the owner.

This restrictive threshold test would greatly reduce the need for any further inquiry where either the amount of the controlled substances involved was substantial or the seized property was only a relatively small part of the owner's assets.

> Once a *prima facie* or threshold finding of excessiveness is made, the government must then show that the property ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Excessive Fines Clause of the Eighth Amendment. In determining whether the forfeiture is grossly disproportionate under that clause, the court should take the following factors into consideration:
>
> 1. Whether the property seized constitutes the owner's livelihood or means to earn a living.
> 2. Whether the property seized is the owner's homestead.
> 3. The degree to which the owner's property has been involved in drug activity, and whether the property has been purchased or obtained through the proceeds of drug activity.
> 4. Whether or not the owner has been convicted of a crime related to the forfeiture, the severity of the crime, and the severity of the criminal sentence imposed upon the owner of the property – i.e. the total punishment imposed on the owner, including the forfeiture.
> 5. The extent of the criminal behavior of the owner of the property and the need for deterrence.

6. The extent to which the government necessarily expended its funds to interdict drug activity involving this property.

All of these factors are appropriately objective and determinations that are traditionally made by the trial courts in weighing various issues before them, such as sentencings. The first factor was a consideration stressed repeatedly by Magna Carta's amercement clause – i.e. that an individual should not be deprived of his livelihood. The second, is a traditionally protected property to some extent under both state homestead laws[5] and federal bankruptcy laws. Under the third factor, consideration should be given to the extent that the property is tied to drug activity and whether or not it has been acquired with the proceeds of drug activity. Fourth, at least some consideration should be given to the amount of the total punishment, if the owner has also been punished in a criminal action. Fifth, the owner's overall criminal background may have a bearing on whether or not a large forfeiture is necessary as a deterrent to further criminal conduct. Finally, the government should have an opportunity to recover its demonstrated, necessary expenses arising in connection with its interdiction of drug activity on the property.

After considering these factors, the District Court should have the option of ordering a forfeiture of less than 100% of the owner's assets, as deemed consistent

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[5] For example, S.D. Codified Laws Annot. §§ 43-31-1 & 2 (1983) provide for a homestead exemption from judicial sale, judgment lien, and mesne or final process, including a mobile home, without motive power, that is larger than two hundred forty square feet, measuring at the base thereof. S.D. Codified Laws Annot. § 43-45-3 (1983) further provides for a $30,000.00 absolute exemption for the proceeds of the sale of a homestead, for a period of one year.

with these factors, or conditioning the forfeiture upon payment of such sum or relinquishment of such other property as seems just under the circumstances.

Petitioner clearly meets the threshold considerations in this case. The value of the forfeited property is overwhelmingly disproportionate to the value of the controlled substances involved in the statutory violation. The forfeiture further took substantially all of Petitioner's assets, as demonstrated by his *in forma pauperis* status in this case.

Application of the remaining factors to Petitioner's case shows that: (1) the Garretson Body Shop was the Petitioner's livelihood or means to earn a living; (2) the 1972 HMET mobile home was the Petitioner's homestead; (3) there is only evidence of one drug transaction and there is no evidence that the Petitioner's Garretson Body Shop or mobile home were purchased with the proceeds of drug activity; (4) Petitioner was convicted of possession of a controlled drug with the intent to distribute and sentenced to seven years in the South Dakota penitentiary; (5) there is no indication in the records that the Petitioner had ever been charged with any drug-related crime until the charges prior to the civil forfeiture proceeding; (6) here South Dakota state authorities had already accomplished the goal of interdicting this drug activity.

The above considerations establish, under the circumstances of this case, that the forfeiture of Petitioner's property was grossly disproportionate. Thus, Petitioner contends that this case should be remanded to the District Court for a determination of whether this forfeiture is so grossly disproportionate to the offense committed by Petitioner as to violate the Eighth Amendment's Excessive Fines Clause.

Although the application of these factors by the District Court may be difficult, the language of the Ninth Circuit Court of Appeals in *U.S. v. Busher, supra,* is instructive:

> This is, admittedly, not an easy line to draw; the Eighth Amendment does not provide a bright line separating punishment that is permissible from that which is not. But a Court may not turn its back on a Constitutional constraint simply because it is difficult to apply.

U.S. v. Busher, supra, 817 F.2d, at 1416.

CONCLUSION

Based upon the foregoing authorities and arguments, the Decision of Eighth Circuit Court of Appeals in the above-entitled matter affirming the Order Granting Summary Judgment by the United States District Court for the District of South Dakota, should be reversed; and the case should be remanded to the District Court for determination, based on factors set forth herein, whether the forfeiture of the Petitioner's property in this case is so grossly disproportionate to the offense committed by Petitioner as to violate the Eighth Amendment Excessive Fines Clause.

Respectfully submitted,

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No. 92-6073

In the Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD LYLE AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Eighth Amendment applies to a statutory *in rem* forfeiture of property.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-6073

RICHARD LYLE AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 21-29) is reported at 964 F.2d 814.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1992. A petition for rehearing was denied on July 2, 1992. The petition for a writ of certiorari was filed on September 30, 1992, and was granted by the Court on January 15, 1993. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." 21 U.S.C. 881(a)(4) and (7) provide:

> (a) Subject property
>
> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * * * *
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—
>
> (A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;
>
> (B) no conveyance shall be forfeited under the provisions of this section by reason of any act of omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and
>
> (C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.
>
> * * * * *
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. 881 (1988 & Supp. III 1991) and 28 U.S.C. 524(c) (1988 & Supp. III 1991) are reprinted in full at App., *infra*, 1a-18a.

STATEMENT

1. Under 21 U.S.C. 881(a), certain assets that are used in, derived from, or intended for use in, drug trafficking are subject to forfeiture. Those forfeitable assets include controlled substances, raw materials, and equipment used in the manufacture of controlled substances, and containers used for illegal drugs or

for any raw materials used in drug manufacture. See 21 U.S.C. 881(a)(1)-(3) and (9). Section 881(a)(4) also authorizes forfeiture of any conveyance (such as an aircraft, an automobile or a vessel) that is used or intended for use "in any manner to facilitate the transportation, sale, receipt, possession, or concealment" of such controlled substances, raw materials, or containers. Section 881(a)(7) provides for forfeiture of "[a]ll real property * * * and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a [federal narcotics felony]." A forfeiture mandated by Section 881(a) is enforced by means of a civil *in rem* action against the assets in question. The statutes relating to the seizure and condemnation of property for violations of the customs laws apply in those *in rem* proceedings. See 21 U.S.C. 881(d).

2. On September 7, 1990, the United States filed an *in rem* action in the United States District Court for the District of South Dakota, seeking forfeiture under 21 U.S.C. 881(a)(4) and 881(a)(7) of a parcel of real property and related improvements known as the Garretson Body Shop and of a mobile trailer home, both of which were located in Garretson, South Dakota. J.A. 3-6. The complaint was supported by the affidavit of Donald Satterlee, a narcotics detective with the Sioux Falls, South Dakota, Police Department, who alleged that petitioner had used the real property and the trailer to sell cocaine on June 13, 1990. J.A. 7-8. Satterlee's affidavit alleged that on that date a government informant had accompanied Keith Engebretson, a known narcotics user, to the Garretson Body Shop to purchase one gram of cocaine. At the shop, petitioner agreed to sell cocaine to Engebretson. Petitioner then went to his nearby

trailer home. Upon his return to the shop, petitioner sold Engebretson two grams of cocaine for an unknown amount of money. *Ibid.*

Satterlee's affidavit further alleged that a search warrant was executed by state authorities on the shop and the mobile home on the day after petitioner's sale to Engebretson, and that the search revealed additional cocaine, some marijuana, and narcotics paraphernalia. J.A. 8. The inventory filed upon the return of the search warrant, which was an exhibit to Satterlee's affidavit, revealed that agents seized from the trailer home a small bag of cocaine; a small bag of marijuana; a bindle of cocaine marked "½"; an electric Ohaus scale; a plate with white powder residue, found together with a razor blade and a straw; a pipe; a "coke snorter"; and $660 in $20 bills. C.A. App. 92. At the body shop, the agents seized a .22 caliber revolver; a small bag of marijuana; two marijuana pipes; a piece of mirror, found together with a white tube and a razor blade; and $3,300 in cash. C.A. App. 92-93. The agents also seized $772 in cash from petitioner. Following the institution of forfeiture proceedings by the United States, petitioner filed a claim alleging ownership of the two properties and an answer to the complaint. J.A. 1, 9-11.

The government subsequently moved for summary judgment. The government relied in part on a new affidavit by Detective Satterlee. In addition to the facts described above, the new affidavit alleged that on October 23, 1990, petitioner had "admitted to the distribution and possession [of cocaine] as charged in open court, and pled guilty in * * * state court to possession with intent to distribute cocaine" and that petitioner had subsequently been sentenced to seven

years' imprisonment. J.A. 14-15. The government also adverted to petitioner's deposition testimony, during which he had declined to answer on Fifth Amendment grounds any questions relating to the weapon, narcotics, paraphernalia, and cash found in the two properties, or the cash found on his person, and in which petitioner had likewise declined to answer whether the two properties had ever been used to facilitate narcotics trafficking. See C.A. App. 96-97 (government motion); C.A. App. 58-68, 72-81, 83-84 (petitioner's deposition). Petitioner opposed summary judgment on the ground, among others, that the civil forfeiture of the two properties would violate the Cruel and Unusual Punishments Clause and the Excessive Fines Clause of the Eighth Amendment C.A. App. 125.

At the hearing on the government's motion, petitioner's counsel conceded "that there was an exchange of cocaine in the body-shop," and that the items listed in the search warrant inventory, including the drugs and money, were found in the body shop and mobile home. See C.A. App. 161, 165. Petitioner's counsel contended, however, that those facts did not constitute a "substantial connection or substantial association or sufficient nexus which would justify the seizure of that property * * * [under] the Eighth Amendment." C.A. App. 161. The district court rejected that argument, concluding that the undisputed facts established a sufficient nexus between the two properties and petitioner's drug transactions, and that the "forfeiture laws [did] not violate any constitutional rights of the [c]laimant and [did] not constitute excessive fines or cruel and unusual punishment." J.A. 19, 20. Accordingly, the

court entered judgment in the government's favor. J.A. 20.

3. The court of appeals affirmed. It first concluded that the government's summary judgment affidavit "demonstrated reasonable grounds to believe both the mobile home and the body shop were used to facilitate illegal drug activity." J.A. 24. The court explained that the body shop "was used as a place to meet a prospective customer, conduct negotiations, and complete a drug transaction," and that the affidavit "tend[ed] to support the inference that the mobile home was used as a place to store drugs." *Ibid.* Because petitioner did "not dispute the government's claim that [he] sold drugs at the body shop," and because he did "not counter any of the facts tending to demonstrate the mobile home was used to store drugs," the court concluded that petitioner "failed to carry his burden * * * to raise any genuine factual issues," and that "summary judgment in favor of the government was [therefore] appropriate." J.A. 24-25.

The court of appeals next rejected petitioner's claim that the forfeiture of the mobile home and body shop violated the Eighth Amendment. J.A. 25-28. The court of appeals noted that the Third and Fourth Circuits have held the Eighth Amendment inapplicable to purely civil proceedings, such as *in rem* forfeitures, but it declined to decide definitively whether "application of the Eighth Amendment depends solely upon whether the statute is classified as criminal or civil." J.A. 27 n.5. Instead, the court focused on the *in rem* nature of the forfeiture proceedings, noting that "[b]ecause the government is proceeding against the 'offending' property, the guilt or innocence of the property's owner is constitutionally irrelevant."

J.A. 26, citing *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-687 (1974). The court explained that the type of proportionality review sought by petitioner would conflict with that basic premise of *in rem* actions, and it therefore "agree[d] with the Ninth Circuit that '[i]f the constitution allows *in rem* forfeiture to be visited upon innocent owners * * * the constitution hardly requires proportionality review of forfeitures.'" J.A. 26, quoting *United States* v. *Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir. 1988), cert. denied, 493 U.S. 954 (1989). The court of appeals conceded that the *in rem* nature of the proceeding might "mean little" when viewed solely from petitioner's perspective, and that in that light it did "appear that the government [was] exacting too high a penalty in relation to the offense committed," but the court nonetheless believed it clear "that the Constitution does not require proportionality * * * in civil proceedings for the forfeiture of property." J.A. 27-28.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The question in this case is whether the prohibitions against "excessive fines" and "cruel and unusual punishments" require that an *in rem* civil forfeiture of property be "proportional" to the culpability of the owner of the property. Seven courts of appeals have concluded that the Eighth Amendment requires no proportionality analysis of civil *in rem* forfeitures, either because that Amendment limits governmental action only in criminal cases, or because the unique nature of *in rem* actions—with their long common

law history and their exclusive focus on the harmful use of property—renders irrelevant the culpability of the owner even if that Amendment is otherwise applicable to civil actions. See *United States* v. *One Parcel of Real Property with Buildings*, 960 F.2d 200, 206-207 (1st Cir. 1992); *United States* v. *Certain Real Property Commonly Known as 6250 Ledge Road*, 943 F.2d 721, 727 (7th Cir. 1991); *United States* v. *Real Property & Residence at 3097 S.W. 111th Ave.*, 921 F.2d 1551, 1557 (11th Cir. 1991); *United States* v. *One 107.9 Acre Parcel of Land*, 898 F.2d 396, 400-401 (3d Cir. 1990); *United States* v. *Tax Lot 1500*, 861 F.2d 232, 233-235 (9th Cir. 1988), cert. denied, 493 U.S. 954 (1989); *United States* v. *Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989). The Second Circuit alone has taken the view that proportionality analysis under the Eighth Amendment is applicable to civil *in rem* forfeitures. *United States* v. *Certain Real Property & Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29, 35-39 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992).[1] The majority view is correct.

1. This Court has long understood the Eighth Amendment to be addressed to the prosecutorial functions of government. In light of the Eighth Amendment's concern with the criminal laws, the Framers could not have believed that civil *in rem* forfeitures were subject to Eighth Amendment scrutiny. Those forfeitures have never been considered criminal pun-

[1] The Sixth Circuit recently adverted to the conflict, but declined to take sides after finding that the forfeiture at issue would be proportional to the culpability of the property's owner even if the Eighth Amendment were applicable. See *United States* v. *Certain Real Property 566 Hendrickson Boulevard*, No. 92-1220 (6th Cir. Feb. 26, 1993), slip op. 13-17.

ishments. On the contrary, the common law courts in this country were exercising jurisdiction *in rem* in the enforcement of civil forfeiture statutes long before the adoption of the Constitution, and laws providing for the forfeiture of property involved in criminal activity were among the earliest statutes enacted by Congress. Under federal forfeiture statutes, as under the common law, property involved in criminal activity is treated as the offender. And because the forfeiture action is concerned principally with the removal of harmful property, this Court has always treated the guilt or innocence of the property's owner as irrelevant.

This Court has refused to redefine *in rem* forfeiture actions solely in accordance with their effects on the owner of the property. Instead, it has adhered to the historical focus of those actions on the harm caused by the offending property. The Court's refusal to disregard the teaching of history in its treatment of *in rem* forfeitures reflects its recognition that property used in ways harmful to the public welfare may properly be considered a common nuisance. Forfeiture laws therefore are based on the premise that certain uses of property are so undesirable that the owner engages in those uses or surrenders control of the property at his peril. By threat of forfeiture, the law does nothing more than enlist the care and responsibility of the property's owners in aid of the public policy reflected in the criminal laws, and precludes evasions by dispensing with the necessity of judicial inquiry into any collusion between the wrongdoer and the alleged innocent owner. In short, when experience has demonstrated that an owner is unable or unwilling to safeguard the community against misuse of his property, the threat of future harm

posed by the property amply justifies its forfeiture. The forfeiture in this case illustrates that point, since the nature of the evidence seized from the two properties—well-known tools of narcotics distribution—indicates that those properties posed the very threat with which Congress was concerned.

2. Petitioner's alternative contention that the forfeitures in this case are "in effect" punishment, and thus subject to the Eighth Amendment, also fails. This Court has long recognized that the determination whether a sanction constitutes punishment is not made from the perspective of the party advancing that claim. In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), the Court identified a number of factors helpful in determining whether a particular sanction constitutes punishment. Those factors indicate that civil *in rem* forfeitures are remedial, not punitive. That is especially true under the drug forfeiture statute at issue here. Forfeitures under Section 881 not only remove the threat of continued drug dealing from the subject property, but they also help fund the government's effort to combat the effects of narcotics trafficking, such as urban blight, violent crime, and addiction. In addition, the conclusion that forfeitures under Section 881 are remedial is consistent with this Court's decision in *United States* v. *Halper*, 490 U.S. 435 (1989). *Halper* held that, in rare cases, sanctions that could not plausibly serve the remedial functions the government assigns to them may be considered punishment under the Double Jeopardy Clause. That holding does not aid petitioner because *in rem* forfeitures necessarily serve the remedial purpose that justifies them—by removing the subject property from those who have rendered it harmful, and by compensating the victims of that harmful activity.

3. The forfeitures in this case should be upheld even if petitioner is correct that those forfeitures must pass "proportionality" scrutiny under the Eighth Amendment. The forfeiture of petitioner's property is well tailored to the government's interests both in obtaining compensation for the costs society has incurred and will continue to incur as a result of drug trafficking, and in protecting the community from further drug dealing. In addition, the evidence seized from the two forfeited properties showed that petitioner was engaged in the retail sale of cocaine, and that he was in possession of drugs, narcotics paraphernalia, and a subsantial amount of cash in small bills. The forfeiture of a house trailer and the premises of a small business was not grossly disproportionate to the serious narcotics distribution and possession offenses established by that evidence.

ARGUMENT

THE *IN REM* CIVIL FORFEITURE IN THIS CASE IS NOT LIMITED BY THE EIGHTH AMENDMENT

A. The Eighth Amendment Does Not Reach Civil *In Rem* Forfeitures, Which Have Long Been Recognized As Remedial Regulations Of Property

Petitioner's principal submission is that the Excessive Fines Clause of the Eighth Amendment applies to civil "penalties," or "sanctions" and that the Eighth Amendment therefore proscribes excessive forfeitures of property, even when those forfeitures result from civil *in rem* proceedings. Pet. Br. 10-23. Petitioner's claim fails because the text and history of the Eighth Amendment reflect the Framers' intention to limit only the prosecutorial function of government; that is, the Amendment was meant to apply only to penalties or exactions that may fairly be

viewed as criminal punishment. The remedial nature of *in rem* forfeiture actions and their long and unique common law history demonstrate that those forfeitures are not penal in nature. *In rem* forfeitures therefore are not limited by the Eighth Amendment.

1. This Court has long understood the Eighth Amendment to be principally "addressed to courts of the United States exercising criminal jurisdiction." *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833) (Story, J.). As the Court explained in *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977), that focus is evident from the words chosen by the Framers, since "[b]ail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government." In view of the clear implication of the constitutional text, and after a careful review of the historical record, the *Ingraham* Court rejected the claim that disciplinary corporal punishment of school children is subject to the Amendment's strictures against "cruel and unusual" punishments.

More recently, after again canvassing the historical record, the Court rejected the claim that punitive damages awarded in private civil suits are limited by the Excessive Fines Clause. See *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989). The Court reaffirmed that the scope of the Eighth Amendment, including the scope of the Excessive Fines Clause, turns solely "on its original meaning, as demonstrated by its historical derivation" —that is, by "the purposes which directed its Framers." 492 U.S. at 264 n.4. That history, as reviewed by this Court in *Browning-Ferris* and other cases,

confirms what the text of the Amendment suggests: that the Excessive Fines Clause was intended to "limit[] the ability of the sovereign to use its *prosecutorial* power * * * for improper ends." *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. at 267 (emphasis added); *id.* at 275 ("the text of the Amendment points to an intent to deal only with the prosecutorial powers of government").

The Eighth Amendment derived from the Virginia Declaration of Rights of 1776, which was in turn derived from the English Bill of Rights of 1689. See *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. at 266-267; *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2686-2688 (1991) (opinion of Scalia, J.); *Ingraham* v. *Wright*, 430 U.S. at 664-665. Most historians believe that the English Bill of Rights was adopted in reaction to the excesses of English judges under the reign of James II, notably the abuses attributed to Lord Chief Justice Jeffreys. Jeffreys presided over the treason trials that followed the rebellion of the Duke of Monmouth in 1685, and over the perjury prosecution of Titus Oakes, a Protestant cleric whose false accusations had caused the death of 15 prominent Catholics. Oakes was fined 1000 marks on each count of the indictment, imprisoned for life, and required to stand in the pillory annually. See *Ingraham* v. *Wright*, 430 U.S. at 664-665; *Harmelin* v. *Michigan*, 111 S. Ct. at 2687-2689 (opinion of Scalia, J.).

Aside from the general illegality and cruelty of the nonmonetary punishments imposed by the King's Bench, that court's abuse of criminal fines was a particular source of concern to the drafters of the English Bill of Rights. See *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. at 267. In keeping with their history as an alternative to incarceration, fines imposed by common law courts frequently required a defendant to stand committed until he paid the required sum. See, *e.g.*, *Ex parte Watkins*, 32 U.S. (7 Pet.) at 575 (noting that the common law practice was "to commit the offender for payment of the fine"); see also 2 F. Pollock & F. Maitland, *History of English Law* 517 (2d ed. 1952).[2] Thus, when the fines imposed by the King's Bench became more excessive and partisan, "some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. at 267. In light of that history, it is hardly surprising that the Court concluded that "at the time of the drafting and ratification of the [Eighth] Amendment * * * as now, fines were assessed in *criminal*, rather than in private civil, actions," *id.* at 265 (emphasis added), and that, accordingly, "the word 'fine' was understood to mean a payment to a sovereign *as punishment* for some offense." *Ibid.* (emphasis added).[3]

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[2] In this country, imprisonment was commonly used to compel the payment of fines even by indigents until quite recently, when the practice was outlawed as a violation of the equal protection rights of those unable to pay. See *Williams* v. *Illinois*, 399 U.S. 235, 239 (1970) (footnote omitted) ("The custom of imprisoning a convicted defendant for nonpayment of fines dates back to medieval England and has long been practiced in this country. At the present time almost all States and the Federal Government have statutes authorizing incarceration under such circumstances.").

[3] Indeed, even the dissenting opinion in *Browning-Ferris* did not suggest that nonpenal, remedial exactions are in any

While the Court has not foreclosed the possibility that the Eighth Amendment might be found applicable in some nominally civil cases, see *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. at 263-264, the restrictions on liberty or other penalties presented by any such case must be "sufficiently analogous to criminal punishments in the circumstances in which they are administered." *Ingraham* v. *Wright*, 430 U.S. at 669 n.37. Thus, any claim that the government's conduct in a civil proceeding is limited by the Eighth Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a criminal punishment at the time the Eighth Amendment was adopted.

2. Petitioner's challenge to the civil *in rem* forfeiture of property used in unlawful activity cannot meet that burden. The Framers of the Eighth Amendment were quite familiar with civil *in rem* forfeitures and, in light of the ancient common law lineage of those forfeitures, the Framers could not have believed them part of an individual's punishment.

As this Court's opinions have made clear, the concept of forfeiture traces its origin to the English common law practice of confiscating "deodands," or inanimate objects that had caused the death of a King's subject. The object was forfeited to the King, "in the belief that the King would provide the money for Masses to be said for the good of the dead man's

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way limited by the provisions of the Eighth Amendment. See 492 U.S. at 282, 298 (O'Connor, J., concurring in part and dissenting in part) (arguing that punitive damages, even if imposed as a result of private litigation, are penal sanctions).

soul, or insure that the deodand was put to charitable uses." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-681 (1974). Because the common law considered the object itself to be the guilty party, it was irrelevant whether the owner of the object was innocent of any wrongdoing. *Id.* at 683.[4]

Although "[d]eodands did not become part of the common-law tradition of this country," *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 682, "[l]ong before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of forfeiture statutes," *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133, 139 (1943). Therefore, "the common law as received in this country at the time of the adoption of the Constitution gave a remedy *in rem* in cases of forfeiture." *Id.* at 153; *see also United States* v. *92 Buena Vista Ave.*, 113 S. Ct. 1126, 1131-1133 (1993) (opinion of Stevens, J.). Indeed, laws providing for the forfeiture of property involved in criminal activity—from violations of customs and impost laws

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[4] While this Court has always affirmed that the "innocence" of a property owner is no bar to the application of civil forfeiture statutes that do not make such innocence a defense, see, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 688-689, the Court has also stated "that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent * * * [or] an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Id.* at 689. This Court's references to "innocence" therefore connote a property owner's exercise of a high level of care with respect to his property.

to piracy—were among the earliest statutes enacted by Congress. See, *e.g.*, Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 39, 47 (forfeiture of ships and cargoes involved in customs offenses); Act of Aug. 4, 1790, ch. 35, §§ 12-16, 22, 27-28, 67, 1 Stat. 157-159, 161, 163-164, 176 (same); *United States* v. *92 Buena Vista Ave.*, 113 S. Ct. at 1132 (opinion of Stevens, J.). "Later statutes involved the seizure and forfeiture of distilleries and other property used to defraud the United States of tax revenues from the sale of alcoholic beverages." *United States* v. *92 Buena Vista Ave.*, 113 S. Ct. at 1132 (opinion of Stevens, J.). The enactment of forfeiture statutes has not abated; "contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 683.

This Court frequently has been urged to disregard the historical focus of *in rem* forfeitures on the offending property, and to redefine those actions solely in accordance with their effects on the owner of the property. The Court has recognized, however, that "whether the reason [for civil forfeiture statutes] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced," *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. 505, 511 (1921), and under that established view "[i]t is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental." *Id.* at 513.[5] Accordingly, despite

[5] See also *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931) ("It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient"); *Dobbins's Distillery* v. *United States*, 96 U.S. 395, 400 (1878) (the law "treat[s] the vessel in which * * * a wrong or offence has been committed, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof"); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (Story, J.) ("The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*").

the "comparative severity" of forfeiture statutes, they repeatedly "have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." *Helvering* v. *Mitchell*, 303 U.S. 391, 400 (1938). Thus, the Court has ruled that civil *in rem* forfeitures are not limited by the Fifth Amendment's Double Jeopardy Clause, *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 363-366 (1984), the Sixth Amendment's Confrontation Clause, *United States* v. *Zucker*, 161 U.S. 475, 480-482 (1896), or the due process requirement of proof beyond a reasonable doubt at a criminal trial, *Lilienthal's Tobacco* v. *United States*, 97 U.S. 237, 271-272 (1878). The Court has time and again also upheld forfeiture statutes against the claim that they deprive innocent owners of their property without due process or that they effect takings of property without compensation. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 680, 685; *Van Oster* v. *Kansas*, 272 U.S. 465, 468 (1926); *J.W. Goldsmith, Jr.-Grant Co* v. *United States*, 254 U.S. at 510-511.

The Court's persistent refusal to disregard the teaching of history in its treatment of *in rem* forfeitures does not stem from any blind adherence to "anachronistic" or "superstitious" notions (see ACLU Br. 20-21 & n.17), but from its recognition that property used in ways manifestly inimical to the public welfare may properly be considered a "common nuisance." *Van Oster* v. *Kansas*, 272 U.S. at 466. By the threat of forfeiture, the law does nothing more than to "interpose[] the care and responsibility of [the property's] owners in aid of the prohibitions of the law and its punitive provisions." *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. at 510. Thus, if an owner allows his property to be turned into a haven for harmful activity, it is entirely appropriate for society to place that property in more careful hands, by sale or otherwise, "as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." *United States* v. *Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844) (Story, J.); accord *Dobbins's Distillery* v. *United States*, 96 U.S. at 400-401; cf. *Republic National Bank* v. *United States*, 113 S. Ct. 554, 559 (1992) (*in rem* forfeiture developed, in part, "to furnish remedies for aggrieved parties"). As this Court explained in *Van Oster* v. *Kansas*:

> It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. Much of the jurisdiction in admiralty, so much of the statute and common law of liens as enables a mere bailee to subject the bailed property to a lien * * * are familiar examples. * * * They suggest that certain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner. So here the legislature, to effect a purpose clearly within its power, has adopted a device consonant with recognized principles and therefore within the limits of due process.

272 U.S. at 467-468; *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 687-688 (noting that forfeiting the criminally used property even when the owners are innocent "may have the desirable effect of inducing them to exercise greater care in transferring possession of their property"); see also *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. at 511 (noting that Blackstone ascribed the misfortunes caused by deodands "to the negligence of the owner"). Thus, when experience has demonstrated that an owner is unable or unwilling to safeguard the community against misuse of his property, the threat of future harm posed by the property amply justifies its forfeiture.

The possibility of further unlawful use of property was a danger Congress expressly recognized and specifically sought to prevent in 1939 when it enacted 49 U.S.C. App. 781, 782, the statutes on which Section 881 (as well as the Puerto Rican statute at issue in *Calero-Toledo*, see 416 U.S. at 686-687 & n.25) is based. As the Committee Report explained:

> There is nothing either novel or unprecedented about the provisions of this bill. They merely extend to the narcotic, counterfeiting, and firearms laws existing statutory provisions for for-

feiting the means of transportation used to facilitate violations of the customs and other laws. Such measures have been in use for customs and other purposes since the very beginning of our Government. * * *

[The customs laws were recently amended] to make discretionary with the courts the former mandatory provisions for the release under bond of vessels seized for violations of the customs laws pending judicial proceedings looking toward forfeiture. This amendment was made necessary by the fact that vessels seized for violations of the customs laws and released on bond frequently returned immediately to the smuggling traffic. Instances were not uncommon of vessels being seized three or four times for different violations and being released on bond each time before the first forfeiture proceeding came up for trial. * * *

> The present legislation * * * is made doubly necessary because not infrequently the means of transportation employed in violations of the laws involved * * * are peculiarly adapted to such type of work as, for instance, high-speed powerboats, fast cars with secret compartments, and aircraft. If such means of transportation are not forfeited, they will be readily available for future violations.

H.R. Rep. No. 1054, 76th Cong., 1st Sess. 2-3 (1939); see also S. Rep. No. 926, 76th Cong., 1st Sess. 2 (1939); H.R. Rep. No. 2751, 81st Cong., 2d Sess. 3 (1950) (noting that "[v]essels, vehicles, and aircraft may be termed the operating tools of dope peddlers * * *. Seizure and forfeiture of these means of transportation provide an effective brake on the traffic in narcotic drugs.").

When Congress first enacted what is now Section 881(a), see Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511(a), 84 Stat. 1276, it likewise authorized the forfeiture not only of the illegal substances themselves, but also of all conveyances used to facilitate the manufacture and distribution of drugs. The 1970 statute therefore "closely paralleled the early statutes used to enforce the customs laws, the piracy laws, and the revenue laws" in that it "generally authorized the forfeiture of property used in the commission of criminal activity, and [it] contained no innocent owner defense." *United States* v. *92 Buena Vista Ave.*, 113 S. Ct. at 1133-1134 (opinion of Stevens, J.). In 1984, Congress added to the list of forfeitable assets any real property that is used or intended to be used to facilitate a felony drug transaction, while at the same time making innocent ownership a defense to forfeitures of real property in certain circumstances. See Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Tit. II, § 306(a), 98 Stat. 2050, codified at 21 U.S.C. 881(a)(7). In so doing, Congress simply recognized that forfeiture of tainted real property, like forfeiture of other facilities of the drug trade, would also "deprive offenders * * * of the instruments through which they might commit further crimes * * * [and would] protect[] the community from the threat of continued drug dealing." *United States* v. *Cullen*, 979 F.2d 992, 994 (4th Cir. 1992).

It was those provisions of the civil drug forfeiture statutes—addressing conveyances and real property—that were invoked to forfeit petitioner's trailer home and repair shop. And the forfeiture of those

properties served the remedial purposes traditionally underlying *in rem* forfeiture statute, for the evidence seized from the two forfeited properties—including well-known tools of the narcotics trade, see, *e.g.*, *United States* v. *One Parcel of Real Property*, 900 F.2d 470, 475 (1st Cir. 1990) (Ohaus scale and firearm)—indicated that the properties posed the very threat with which Congress was concerned.

3. Unable to establish that the Framers could have believed that *in rem* civil forfeitures were criminal punishments regulated by the Eighth Amendment, petitioner devotes a large part of his brief to the proposition that forfeitures of property are analogous to medieval "amercements," or royal penalties that were limited by the provisions of Magna Carta. In petitioner's view, the Excessive Fines Clause should be read as a limit to all civil penalties that might have been thought of as amercements in medieval times. Pet. Br. 10-23, 45-46. The short answer to petitioner's "intriguing" argument, *Browning-Ferris*, 492 U.S. at 268, is that the Court has "hesitate[d] to place great emphasis on the particulars of 13th-century English practice, particularly when the interpretation * * * urged * * * appears to conflict with the lessons of more recent history," *ibid.*—*i.e.*, that "the Excessive Fines Clause * * * limit[s] the ability of the sovereign to use its *prosecutorial* power, including the power to collect fines, for improper ends." *Id.* at 267 (emphasis added); see also *Solem* v. *Helm*, 463 U.S. 277, 284 n.8 (1983) (noting that an amercement "was the most common *criminal* sanction in 13th-century England") (emphasis added). In any event, whatever role there may be for petitioner's historical argument with respect to

in personam civil penalties imposed by the government, petitioner does not cite any historical evidence supporting his theory that *in rem* forfeitures ever were considered "amercements"—much less the "fines" of which the Eighth Amendment speaks. To the contrary, as discussed above, the unique common law history of *in rem* forfeitures undermines petitioner's submission.

There is no greater merit in petitioner's apparent contention that civil forfeitures must be subject to Eighth Amendment scrutiny because, like the fines limited by the Amendment, they are a source of revenue to the government. Pet. Br. 21-22 (citing *Harmelin* v. *Michigan*, 111 S. Ct. at 2693 n.9 (opinion of Scalia, J.)); see also ACLU Br. 26 n.20. As we discuss in more detail below, the effects of the drug trade, such as urban blight, significantly increased violent crime, and drug addiction and other health problems, require societal expenditures that far outweigh the "revenue" the government derives from asset forfeitures. Moreover, petitioner's argument proves too much, because not even petitioner suggests that any financial levy—including presumably all federal, state, and local taxation—is subject to Eighth Amendment scrutiny. Cf. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 631-632 (1989). If the historical record demonstrates that a financial levy is not and has never been an Eighth Amendment "fine," that levy cannot be transformed into one by the mere claim that it might some day be set at too high a level. Cf. *Harmelin* v. *Michigan*, 111 S. Ct. at 2697 n.11 (opinion of Scalia, J.). At any rate, petitioner is simply wrong in asserting that civil forfeitures present the same possibilities for abuse as the criminal fines that *are* covered by

the Eighth Amendment. At least where property is forfeited as a result of narcotics trafficking by its owner, as is the case here, *in rem* civil forfeitures differ markedly from criminal fines in that the trafficker alone, not the government, selects the size of the "penalty." Cf. *Chapman* v. *United States*, 111 S. Ct. 1919, 1928 n.6 (1991). "So far as the public welfare is concerned, the Ferrari is at least as harmful an instrumentality as the Chevette." *United States* v. *Cullen*, 979 F.2d at 995. A trafficker's voluntary choice of the Ferrari as the means best adapted to ply his harmful trade does not raise any danger with which the Eighth Amendment is concerned.

B. Section 881 Forfeitures Should Not Be Re-Classified As "Penal" Under Any Test Previously Applied By This Court

Petitioner alternatively contends (Br. 18, 28-33) that civil forfeitures under Section 881(a) are subject to Eighth Amendment limitations because they "are, in effect, punishment," in light of this Court's analysis in two prior decisions—*Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and *United States* v. *Halper*, 490 U.S. 435, 447-450 (1989).

1. In *Kennedy* v. *Mendoza-Martinez*, the Court considered a section of the Nationality Act of 1940 that "automatically strip[ped] an American of his citizenship * * * whenever [he] depart[ed] from or remain[ed] outside the jurisdiction of this country for the purpose of evading his military obligations," 372 U.S. at 166, and found "conclusive evidence of congressional intent" to treat denationalization as punishment. *Id.* at 169. In so doing, the Court identified seven factors as useful in determining whether a law

is penal or regulatory in character (*id.* at 168-169) (footnotes omitted):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.

While that list of considerations is instructive, it is "neither exhaustive nor dispositive." *United States* v. *Ward*, 448 U.S. 242, 249 (1980); see also *Bell* v. *Wolfish*, 441 U.S. 520, 535-540 (1979).

Because petitioner concedes, as he must, that Congress enacted "section 881 * * * as a civil remedy," Pet. Br. 28, "only the clearest proof could suffice to establish," *United States* v. *Ward*, 448 U.S. at 249 (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960)), that "the statutory scheme [is] so punitive either in purpose or effect as to negate that intention." *United States* v. *Ward*, 448 U.S. at 248-249; accord *United States* v. *One Assortment of 89 Firearms*, 465 U.S. at 362-363. As was the case in *One Assortment of 89 Firearms*, where this Court held an *in rem* forfeiture of property involved in criminal activity was not punishment under the *Mendoza-Martinez* test, that proof is absent here.

Thus, the sanction of forfeiture imposes no "affirmative disability or restraint" on the property's owner. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S.

at 168. As we have noted, forfeiture has not "historically been regarded as a punishment." *Ibid.* It does not "come[] into play only on a finding of *scienter*," *ibid.*, since scienter is irrelevant to an *in rem* forfeiture. To be sure, the operation of Section 881(a) may have the incidental effects of promoting deterrence and even retribution. See 372 U.S. at 168. But the principal purposes of forfeiture are different—to make the offending property unavailable for continuing use in the commission of criminal acts, and to secure some compensation for those injured by those criminal acts. See *id.* at 169; see also *United States* v. *Brig Malek Adhel*, 43 U.S. (2 How.) at 233.

Petitioner concentrates his attack principally on the fact that much of the conduct covered by Section 881(a) is defined as criminal under the federal narcotics laws. Pet. Br. 30-32. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 168. As this Court has explained, however, "that indication is not as strong as it might seem at first blush" because "Congress may impose both a criminal and a civil sanction in respect to the same act or omission," *United States* v. *One Assortment of 89 Firearms*, 465 U.S. at 365 (quoting *Helvering* v. *Mitchell*, 303 U.S. at 399), and has done so in a variety of contexts. See also *United States* v. *Ward*, 448 U.S. at 249-250. In *One Assortment of 89 Firearms*, this Court found far more significant the fact that the statute being challenged, like Section 881(a), subjected to forfeiture property "used *or intended to be used in*" violations of the law defining the related criminal offense. 465 U.S. at 363 (emphasis by the Court). Because the law defining the related crime did "not render unlawful an *intention*," the Court found it "apparent * * * that the forfeiture provisions * * * were meant to be broader

in scope than the criminal sanctions," *id.* at 363-364 (emphasis by the Court), and thus "the forfeiture remedy [could not] be said to be coextensive with the criminal penalty." *Id.* at 366.

In a related argument, petitioner's amici make much of the fact that Congress has enacted parallel criminal forfeiture provisions, see 21 U.S.C. 853, that in some circumstances can be used in lieu of the civil forfeitures prescribed by Section 881. See ACLU Br. 6-8; NACDL Br. 9. *In personam* forfeiture statutes, though well grounded in the English common law, see *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 682-683, were unknown in this country until the enactment of the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970. See 1 C. Wright, *Federal Practice & Procedure* § 125.1, at 389 (2d ed. 1982) ("Until 1970 American law did not use the concept of a 'criminal forfeiture' "). Far from evincing Congress's intent to treat civil forfeiture as "punishment," as amici suggest, the advent of criminal forfeiture provisions, including 21 U.S.C. 853, generally reflects congressional efforts to make the advantages of the forfeiture remedy more readily available in various circumstances, particularly in light of the acute problem presented by the backlog of civil matters in federal courts. See S. Rep. No. 225, 98th Cong., 1st Sess. 195-197 (1983). In addition, *in personam* actions sometimes make it possible for the government to seize comparable or "substitute" assets of the drug trafficker when he or his confederates manage to secrete tainted property—thus placing that property beyond the reach of an action *in rem* and potentially depriving society of compensation for the unlawful conduct. Contrary to the suggestions of petitioner's amici, the creation of a remedy of forfei-

ture that functions as part of a criminal prosecution does not suggest that the separate civil *in rem* forfeiture remedy is inherently punitive. In fact, the creation of separate criminal and civil remedies suggests just the opposite. What is more, even with respect to *in personam* forfeitures, the fact that relief is available as part of the criminal process does not render the remedy inherently punitive, any more than the comparable availability of restitution (see 18 U.S.C. 3663) makes the government's interest in victim compensation inherently "penal."

Far more important than any partial overlap with the criminal forfeiture provisions or the laws defining the related narcotics crimes is the fact that the forfeiture provision of Section 881 "furthers broad remedial aims." *United States* v. *One Assortment of 89 Firearms*, 465 U.S. at 364. As Justice Kennedy recently noted, "[p]ossession, use, and distribution of illegal drugs represents 'one of the greatest problems affecting the health and welfare of our population.'" *Harmelin* v. *Michigan*, 111 S. Ct. at 2705-2706 (concurring opinion) (quoting *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 668 (1989)); accord *Florida* v. *Royer*, 460 U.S. 491, 513, 519 (1983) (Blackmun, J., dissenting). Quite apart from the health and related problems created by addiction alone, "[s]tudies * * * demonstrate a direct nexus between illegal drugs and crimes of violence," *Harmelin* v. *Michigan*, 111 S. Ct. at 2706 (Kennedy, J., concurring in part and concurring in judgment), including the bulk of homicides, assaults, robberies, and weapons offenses for which national figures are available. *Ibid.*

The drain on the public fisc attributable to the vastly increased law enforcement expenses that have

accompanied the drug epidemic, and to the care, treatment, and rehabilitation of drug addiction and related problems is practically incalculable—and easily dwarfs the value of assets acquired by the government as a result of asset forfeitures. See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1991*, at 2 (1992) (noting that federal, state, and local governments expended $31.8 billion for police protection during Fiscal Year 1990, exclusive of judicial, legal services, and correctional outlays); D. Rice, S. Kelman, L. Miller & S. Dunmeyer, *The Economic Costs of Alcohol and Drug Abuse and Mental Illness: 1985*, at 23-24 (1990) [hereinafter Rice] (calculating the economic costs of drug addiction during 1985 at $44.1 billion, including $13.2 billion attributable to increased police and related costs). Compare U.S. Dep't of Justice, *Annual Report of the Department of Justice Asset Forfeiture Program* at 31 (1990) (during Fiscal Year 1990 the Department of Justice Asset Forfeiture Fund received deposits of $460 million from all federal forfeiture statutes, and an additional $43 million in property was placed into "official use" by law enforcement agencies). That drain on the public fisc is likely only to increase as a result of "[c]rack cocaine addiction and its devastating consequences." Rice, *supra*, at 23; see also Office of Inspector General, U.S. Dep't of Health & Human Services, *Crack Babies* at 3 (June 1990) (study identifying 8,974 "crack baby" cases reported to child welfare agencies in eight metropolitan areas during a one-year period, and estimating their medical, foster-care, developmental and related costs through age five at approximately $2 billion).

The forfeiture provision of Section 881(a) addresses and seeks to remedy those problems in two ways.

First, Section 881(a) removes the instruments used by drug traffickers to ply their trade, see *United States* v. *Cullen*, 979 F.2d at 994, thereby protecting the community from the threat of continued drug dealing and advancing "the legitimate regulatory goal" of "preventing danger to the community." *United States* v. *Salerno*, 481 U.S. 739, 747 (1987). Second, as this Court has recognized, pursuant to 28 U.S.C. 524(c) (1988 & Supp. III 1991), forfeited assets "are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways," including funding federal, state, and local police protection. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. at 629 & n.6. That use of forfeited property makes Section 881(a) analogous to the statute considered by this Court in *United States* v. *Ward*, where "the fact that collected assessments [were] deposited in a revolving fund used to defray the expense of [oil spill] cleanup operations [was] a strong indicator of the pervasively civil and compensatory thrust of the statutory scheme." 448 U.S. at 256 (Blackmun, J., concurring in judgment).[6]

[6] Significantly, the statute at issue in *Ward* not only imposed a civil penalty on the person responsible for an oil discharge, but also authorized the United States to collect "the costs of removal, containment, or dispersal of a discharge from the person * * * responsible for that discharge in cases where that person * * * had been identified." *United States* v. *Ward*, 448 U.S. at 246. Civil penalties, and the revolving fund into which they were deposited, therefore effectively defrayed the costs of cleanup when the party responsible either could not be identified or had become insolvent. See *Ward* v. *Coleman*, 598 F.2d 1187, 1191 (10th Cir. 1979), rev'd, 448 U.S. 242 (1980). That is to say, the civil penalties upheld as remedial by the *Ward* Court were largely used to pay for the social costs created by others engaged in the defendant's business. *Ward* therefore answers petitioner's claim that defraying the social costs imposed on society by others engaged in drug trafficking is not a proper remedial objective. See Pet. Br. 32-33.

2. Petitioner's contention that a different result is required by *United States* v. *Halper*, *supra*, is wide of the mark. In *Halper*, the defendant was convicted of submitting false claims to the government, and was later sued for civil penalties based on the same conduct. Finding that the civil penalties assessed under the statute served no remedial purpose, the Court held that the civil penalties constituted "punishment" and that their imposition following a criminal penalty based on the same conduct violated the Double Jeopardy Clause. *Halper* did not constitute a major departure from the Court's traditional deference to Congress's denomination of remedies as civil or criminal; rather, it "announce[d] * * * a rule for the rare case * * * where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused," 490 U.S. at 449, such that a nominally civil sanction "may not fairly be characterized as remedial, but *only* as a deterrent or retribution." *Ibid.* (emphasis added). As the Fourth Circuit recently explained, *Halper*'s analysis cannot readily be transposed to the civil forfeiture context:

> We do not believe that *Halper* requires such complicated, individualized accountings in forfeiture proceedings. *Halper* involved a civil penalty intended to substitute for damages suffered by the government for the fraudulent acts committed upon it. The remedial purpose of that penalty was one of compensation, and the amount sought

> by the government overwhelmed any realistic estimate of the government's pecuniary loss. Here, by contrast, the government seeks the forfeiture of the [claimants'] building not to compensate itself for any costs of investigation or prosecution, but to remove what had become a harmful instrumentality in the hands of the [claimants]. The public danger that the building poses in the hands of the [claimants] bears little relation to its monetary value, small or large.

United States v. *Cullen*, 979 F.2d at 995; accord *United States* v. *McCaslin*, 959 F.2d 786, 788 (9th Cir.) ("*Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government. * * * In such forfeitures there is no necessary relation between the value of the property forfeited and the loss to the government"), cert. denied, 113 S. Ct. 382 (1992). Indeed, far from supporting petitioner's claim that civil forfeitures are punishments, the principal significance of *Halper* to this case lies in its categorical rejection of petitioner's basic theory "that whether a sanction constitutes punishment must be determined from the defendant's perspective." *United States* v. *Halper*, 490 U.S. at 447 n.7.

The only court of appeals to conclude that civil *in rem* forfeitures can qualify as "punishment" under *Halper*—the Second Circuit—did so on the ground that the government in that case waived any claim that the property at issue was "an 'instrumentality of crime' " or otherwise "culpable." *United States* v. *Certain Real Property & Premises Known as 38 Whalers Cove Drive*, 954 F.2d at 37. Thus, the Second Circuit concluded that civil forfeitures can constitute punishment only by expressly disregarding the traditional justifications for those forfeitures. Instead, the court compared the value of the property forfeited with "the total value of cocaine sold inside it," *ibid.*—a figure that plainly bore no relation to the social harm caused by that drug transaction specifically, or by drug trafficking generally. Because the Second Circuit failed to consider the policies supporting the forfeiture of instrumentalities used to facilitate criminal activity, its decision that such forfeitures can amount to punishment under *Halper* is not analytically sound and should not be followed by this Court.[7]

[7] Finally, petitioner and his amici place some reliance on this Court's characterization of forfeiture proceedings as "quasi-criminal" in *United States* v. *Boyd*, 116 U.S. 616, 634 (1886), and *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965), see ACLU Br. 15; Pet. Br. 24-27 (citing *One 1958 Plymouth Sedan* and *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971)). Those decisions are limited to the Fourth and Fifth Amendment contexts. Moreover, while the Court has not repudiated the actual holding of *Boyd*—at least to the extent of permitting invocation of the privilege against compulsory self-incrimination when the claimant in a forfeiture proceeding faces a danger of prejudice "in respect to later criminal proceedings," *United States* v. *Ward*, 448 U.S. at 254—this Court "has declined * * * to give full scope to the reasoning and dicta in *Boyd*, noting on at least one occasion that '[s]everal of *Boyd's* express or implicit declarations have not stood the test of time.' " *United States* v. *Ward*, 448 U.S. at 253, quoting *Fisher* v. *United States*, 425 U.S. 391, 407 (1976). Indeed, some decisions of this Court appear to limit even the narrow Fifth and Fourth Amendment holdings of *Boyd* and *One 1958 Plymouth Sedan*, respectively, to forfeiture statutes under which a monetary penalty or forfeiture "could not be had" without a determination that the criminal law has been violated—as distinguished from statutes under which "no criminal offense, much less a criminal conviction, is required." *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 236 n.6 (1972).

C. The Forfeitures In This Case Do Not Offend The Eighth Amendment Even If Proportionality Analysis Is Required For *In Rem* Civil Forfeitures

Finally, the forfeiture of petitioner's property should be upheld even if petitioner is correct that those forfeitures must pass "proportionality" scrutiny under the Excessive Fines Clause. While this Court has never adopted a standard of "excessiveness" under the Excessive Fines Clause, it has indicated that, under the parallel requirement of the Bail Clause, "to determine whether the Government's response is excessive, [one] must compare that response against the interest the Government seeks to protect by means of that response." *United States* v. *Salerno*, 481 U.S. at 754. Measured against that yardstick, the forfeiture of petitioner's property, far from being excessive, is well tailored to the government's interests both in obtaining compensation for the costs it has incurred and will continue to incur as a result of drug trafficking, and in protecting the community from further drug dealing.

The same conclusion follows under the proportionality tests this Court has fashioned under the Cruel and Unusual Punishments Clause. Even if the forfeiture of petitioner's property is characterized as punishment, the forfeiture cannot reasonably be thought "grossly disproportionate" to the harm caused by petitioner's actions in maintaining a retail outlet for cocaine distribution. See *Harmelin* v. *Michigan*, 111 S. Ct. at 2705-2706 (Kennedy, J., concurring in part and concurring in judgment). Petitioner's claim that proportionality analysis should ignore the grave social harm caused by his offense and concentrate instead on "the value of [the] controlled substances involved in the statutory violation," Pet. Br. 37, finds no support in logic or in this Court's cases. See, *e.g.*, *Harmelin* v. *Michigan*, 111 S. Ct. at 2706 (Kennedy, J., concurring in part and concurring in judgment); *Coker* v. *Georgia*, 433 U.S. 584, 598 (1977) (opinion of White, J.) (noting that "[b]ecause [the crime of rape] undermines the community's sense of security, there is public injury as well"). Still less supportable is the suggestion that the Constitution may require financial punishments to be calibrated so that the marginal disutility of the last dollar taken is the same for all individuals. ACLU Br. 28-29. The marginal utility of each additional day of freedom, no less than the marginal utility of each additional dollar, is different for each individual. Yet this Court has never required such individualized sentencing outside the capital context. See *Harmelin* v. *Michigan*, 111 S. Ct. at 2701-2702; *Chapman* v. *United States*, 111 S. Ct. at 1928-1929.

The evidence before the trial court showed that petitioner was engaged in the retail sale of cocaine, and that he was in possession of drugs, narcotics paraphernalia, and a substantial amount of cash in small bills. The forfeiture based on that conduct resulted in petitioner's loss of a house trailer and the premises of a small business, the total value of which petitioner estimates at less than $40,000. Pet. Br. 4-5. That loss was not grossly disproportionate to the serious narcotics distribution and possession offenses established by the evidence. Indeed, petitioner would have been subject to a fine of as much as one million dollars if he had been prosecuted for distribution of cocaine in federal court. See 21 U.S.C. 841(b)(1)(C). Thus, even if *in rem* civil forfeitures are subject to proportionality review, petitioner's challenge to the civil forfeiture of his property must fail.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Title 21, Section 881 (1988 & Supp. III 1991) provides:

§ 881. Forfeitures

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance

was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, ~~manu~~factured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Drug Paraphernalia Control Act).

(11) Any firearm (as defined in section 921 of title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in para-

graph (1) or (2) and any proceeds traceable to such property.

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner

as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) Custody of Attorney General

Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable

The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be

performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Disposition of forfeited property

(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 2291(h) of title 22.

(2)(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this subchapter shall be used to pay—

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent.

Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of title 28, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A),

except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of title 39, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)—

(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

(4)(A) With respect to real property described in subparagraph (B), if the chief executive officer of the State involved submits to the Attorney General a request for purposes of such subparagraph, the authority established in such subparagraph is in lieu of the authority established in paragraph (1)(B).

(B) In the case of property described in paragraph (1)(B) that is civilly or criminally forfeited under this subchapter, if the property is real property that is appropriate for use as a public area reserved for recreational or historic purposes or for the preservation of natural conditions, the Attorney General, upon the request of the chief executive officer of the State in which the property is located, may transfer title to the property to the State, either

without charge or for a nominal charge, through a legal instrument providing that—

(i) such use will be the principal use of the property; and

(ii) title to the property reverts to the United States in the event that the property is used otherwise.

(f) Forfeiture and destruction of schedule I and II substances

(1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such raw materials or products shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such

raw materials or products under such circumstances as the Attorney General may deem necessary.

(g) Plants

(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

(h) Vesting of title in United States

All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil forfeiture proceedings

The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter or subchapter II of this chapter, which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue

In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

Title 28, Section 524(c) (1988 & Supp. III 1991) provides:

§ 524. Availability of appropriations

* * * * *

(c)(1) There is established in the United States Treasury a special fund to be known as the Department of Justice Assets Forfeiture Fund (hereafter in this subsection referred to as the "Fund") which shall be available to the Attorney General without fiscal year limitation for the following law enforcement purposes—

> (A) the payment, at the discretion of the Attorney General, of any expenses necessary to seize, detain, inventory, safeguard, maintain, advertise, or sell property under seizure, detention, or forfeited pursuant to any law enforced or administered by the Department of Justice, or of any other necessary expenses incident to the seizure, detention, or forfeiture of such property; such payments may include—

(i) payments for contract services, the employment of outside contractors to operate and manage properties or provide other specialized services as necessary to dispose of such properties in an effort to maximize the return from such properties, and payments to reimburse any Federal, State, or local agency for any expenditures made to perform the foregoing functions; and

(ii) payments made pursuant to regulations promulgated by the Attorney General, that are necessary and direct program-related expenses for the purchase or lease of automatic data processing equipment (not less than a majority of which use will be program related), training, printing, contracting for services directly related to the identification of forfeitable assets, processing of and accounting for forfeitures, and the storage, protection, and destruction of controlled substances.

(B) the payment of awards for information or assistance directly relating to violations of the criminal drug laws of the United States;

(C) at the discretion of the Attorney General, the payment of awards for information or assistance leading to a civil or criminal forfeiture involving any Federal agency participating in the Fund;

(D) the compromise and payment of valid liens and mortgages against property that has been forfeited pursuant to any law enforced or administered by the Department of Justice, subject to the discretion of the Attorney General to determine the validity of any such lien or mortgage and the amount of payment to be made, and the employment of attorneys and other personnel skilled in State real estate law as necessary.

(E) disbursements authorized in connection with remission or mitigation procedures relating to property forfeited under any law enforced or administered by the Department of Justice;

(F) for equipping for law enforcement functions any government-owned or leased vessels, vehicles, and aircraft available for official use by any federal agency participating in the Fund;

(G) for purchase of evidence of any violation of the Controlled Substances Act, the Controlled Substances Import and Export Act, chapter 96 of title 18, or sections 1956 and 1957 of title 18; and

(H) after all reimbursements and program-related expenses have been met at the end of fiscal year 1989, the Attorney General may tranfer deposits from the Fund to the building and facilities account of the Federal prison system for the construction of correctional institutions.

Amounts for paying the expenses authorized by subparagraphs (A)(ii), (B), (C), (F), and (G) shall be specified in appropriations acts. Amounts for other authorized expenditures and payments from the Fund, including equitable sharing payments, are not required to be specified in appropriations acts. The Attorney General may exempt the procurement of contract services under subparagraph (A) under the fund from section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), title III of the Federal

Property and Administrative Services Act of 1949 (41 U.S.C. 251 and following), and other provisions of law as may be necessary to maintain the security and confidentiality of related criminal investigations.

(2) Any award paid from the Fund for information, as provided in paragraph (1)(B) or (C), shall be paid at the discretion of the Attorney General or his delegate, under existing departmental delegation policies for the payment of awards, except that the authority to pay an award of $250,000 or more shall not be delegated to any person other than the Deputy Attorney General, the Associate Attorney General, the Director of the Federal Bureau of Investigation, or the Administrator of the Drug Enforcement Administration. Any award for information pursuant to paragraph (1)(B) shall not exceed $250,000. Any award for information pursuant to paragraph (1)(C) shall not exceed the lesser of $250,000 or one-fourth of the amount realized by the United States from the property forfeited.

(3) Any amount under subparagraph (F) of paragraph (1) shall be paid at the discretion of the Attorney General or his delegate, except that the authority to pay $100,000 or more may be delegated only to the respective head of the agency involved.

(4) There shall be deposited in the Fund—

(A) all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice, except all proceeds of forfeitures available for use by the Secretary of the Treasury or the Secretary of the Interior pursuant to section 11(d) of the Endangered Species Act (16 U.S.C. 1540(d)) or section 6(d) of the Lacey Act Amendments of 1981 (16 U.S.C.

3375(d)), or the Postmaster General of the United States pursuant to 39 U.S.C. 2003(b)(7);

(B) all amounts representing the Federal equitable share from the forfeiture of property under any State, local or foreign law, for any Federal agency participating in the Fund.

(5) Amounts in the Fund, and in any holding accounts associated with the Fund which are not currently needed for the purpose of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States and all earnings on such investments shall be deposited in the Fund.

(6) The Attorney General shall transmit to the Congress, not later than 4 months after the end of each fiscal year, detailed reports as follows:

(A) a report on—

(i) the estimated total value of property forfeited under any law enforced or administered by the Department of Justice with respect to which funds were not deposited in the Fund; and

(ii) the estimated total value of all such property transferred to any State or local law enforcement agency;

(B) a report on—

(i) the Fund's beginning balance;

(ii) sources of receipts (seized cash, conveyances, and others);

(iii) liens and mortgages paid and amount of money shared with State and local law enforcement agencies;

(iv) the net amount realized from the year's operations, amount of seized cash be-

ing held as evidence, and the amount of money legally allowed to be carried over to next year;

(v) any defendant's equity in property valued at $1,000,000 or more; and

(vi) year-end Fund balance; and

(C) a report for such fiscal year, containing audited financial statements, in the form prescribed by the Attorney General, in consultation with the Comptroller General, including profit and loss information with respect to forfeited property (by category), and financial information on forfeited property transactions (by type of disposition).

(7) The Fund shall be subject to annual audit by the Comptroller General.

(8) The provisions of this subsection relating to deposits in the Fund shall apply to all property in the custody of the Department of Justice on or after the effective date of the Comprehensive Forfeiture Act of 1983.

(9)(A) There are authorized to be appropriated such sums as necessary for the purposes described in subparagraphs (A)(ii), (B), (C), (F), and (G) of paragraph (1).

(B) Subject to subparagraph (C), in each of fiscal years 1990, 1991, 1992, and 1993, the Attorney General may transfer from the Fund not more than $150,000,000 to the Special Forfeiture Fund established by section 6073 of the Anti-Drug Abuse Act of 1988. Such transfers shall be made at the end of each quarter of the fiscal year involved and on a quarterly pro rata basis.

(C) Transfers under subparagraph (B) may be made only from excess unobligated amounts and only to the extent that, as determined by the Attorney General, such transfers will not impair the future availability of amounts for the purposes under paragraph (1). Further, transfers under subsection (B) may be made only to the extent that the sum of the transfers for the current fiscal year and the unobligated balance at the beginning of the current fiscal year for the Special Forfeiture Fund do not exceed $150,000,000.

(D) At the end of each of fiscal years 1990, 1991, 1992, and 1993, the Attorney General may retain in the Fund not more than $15,000,000, or, if determined by the Attorney General to be necessary for asset-specific expenses, a greater amount equal to not more than one-tenth of the total of obligations from the Fund in preceding fiscal year.

(E) Subject to the notification procedures contained in section 606 of Public Law 101-515, and after reserving the amounts authorized in subparagraph (D) above, any unobligated balances remaining in the Fund on September 30, 1991, and on September 30 of each fiscal year thereafter, shall be available to the Attorney General, without fiscal year limitation, to be transferred to any Federal agency to procure vehicles, equipment, and other capital investment items for law enforcement, prosecution and correctional activities, and related training requirements.

(10) Following the completion of procedures for the forfeiture of property pursuant to any law enforced or administered by the Dtpartment, the Attorney General is authorized, at his discretion, to

warrant clear title to any subsequent purchaser or transferee of such forfeited property.

(11) For the purposes of this subsection, property is forfeited pursuant to a law enforced or administered by the Department of Justice if it is forfeited pursuant to—

(A) any criminal forfeiture proceeding;

(B) any civil judicial forfeiture proceeding; or

(C) any civil administrative forfeiture proceeding conducted by the Department of Justice,

except to the extent that the seizure was effected by a Customs officer or that custody was maintained by the United States Customs Service in which case the provisions of section 613A of the Tariff Act of 1930 (19 U.S.C. 1613a) shall apply.

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No. 92-6073

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October Term, 1992

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v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE HISTORY OF THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT AND THE HISTORY OF CIVIL FORFEITURE SHOW THAT THE EXCESSIVE FINES CLAUSE APPLIES TO CIVIL FORFEITURES UNDER 21 U.S.C. § 881(a)(4) and § 881(a)(7).

The Respondent's first major premise is that " . . . any claim that the government's conduct in a civil proceeding is limited by the Eighth Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a criminal punishment at the time the Eighth Amendment was adopted." Resp.Br. 16.

The government refers to *Ingraham v. Wright*, 430 U.S. 651 (1977) and *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) for the proposition that the Eighth Amendment "was meant to apply only to penalties or exactions that may fairly be viewed as criminal punishment." Resp.Br. 12-13.

Browning-Ferris Industries, supra, however, does not "go so far as to hold that the Excessive Fines Clause applies just to criminal cases." *Id.* 492 U.S. at 263. The Court's holding is simply that the Excessive Fines Clause does not apply "to cases of punitive damages awards in *private civil cases*, because they are too far afield from the concerns that animate the Eighth Amendment." *Id.* 492 U.S. at 275. (Emphasis added). The Court leaves open the possibility of the application of the Excessive Fines Clause to civil cases where the government exacts an excessive financial burden on a person:

> We think it clear, from both the language of the Excessive Fines Clause and the nature of our constitutional framework, that the Eighth Amendment places limits on the steps a government may take against an individual, whether it be keeping him in prison, *imposing excessive monetary sanctions*, or using cruel and unusual punishments.

Id. at 492 U.S. 275. (Emphasis added). The Court cited *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989) in a footnote, stating that " . . . our opinion in *Halper* implies that punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns. . . . " *Id.* 492 U.S. at 275 n.21.

Nor does *Ingraham v. Wright, supra*, provide authority that the Excessive Fines Clause of the Eighth Amendment applies only to "criminal punishments." *Ingraham* involved the application of the Cruel and Unusual Punishments Clause to disciplinary corporal punishment in

public schools. *Id.* at 1405. Moreover, the Court "left open in *Ingraham* the possibility that the Cruel and Unusual Punishments Clause might find application in some civil cases." *Browning-Ferris Industries, supra*, 492 U.S. at 264, n.3, citing *Ingraham v. Wright*, 430 U.S. at 669, n.37. Further, as pointed out in the *Amicus Curiae* Brief of the A.C.L.U., *Ingraham* is factually distinguishable since its concern "was to distinguish the punishment of criminals from the punishment of school children," and "[a]ccording to the Court, '[t]he schoolchild has little need for the protection of the Eighth Amendment,' A.C.L.U. *Amicus Curiae* brief, p.12, citing *Ingraham v. Wright, supra*, 430 U.S. at 670.

The government argues that the Excessive Fines Clause was intended to " 'limit [] the ability of the sovereign to use its *prosecutorial* power . . . for improper ends.' " Resp.Br. 14, citing *Browning-Ferris, supra*, 492 U.S. at 267. Yet the "prosecutorial powers of government" display themselves in the civil context, as well as the criminal context. *Black's Law Dictionary*, defines the word "prosecution" as "A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime." But it also states that, "The term is also frequently used respecting civil litigation. . . . " *Black's Law Dictionary*, (fifth edition) (1979).

Even accepting the government's first premise, it is difficult to ascertain how the loss of one's home and livelihood is not " 'sufficiently analogous to criminal punishments in the circumstances in which they are administered,' " Resp. Br. 16, quoting from *Ingraham v. Wright, supra*, 430 U.S. 669 n.37, so as to invoke the protections of the Eighth Amendment.

The government argues that the "Framers of the Eighth Amendment were quite familiar with civil *in rem* forfeiture and, in light of the ancient common law lineage of those forfeitures, the Framers could not have believed them part of an individual's punishment." Resp. Br. 16. However, the *in rem* forfeitures with which the Framers were familiar were different from the *in rem* forfeitures under 21 U.S.C. §§ 881(a)(4) and 881(a)(7) which are the subject of this case. In the case, *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 63 S.Ct. 499 (1943), cited by the government at Resp. Br. 17, the issue was whether California's forfeiture of a fishnet was a common law remedy "within the statutory exception to the exclusive jurisdiction in admiralty conferred on district courts of the United States. . . . " *Id.* 318 U.S. at 134. That case does state that common law courts in the Colonies were exercising *in rem* jurisdiction before the adoption of the Constitution. But the discussion centers in large part around proceedings against vessels charged with smuggling, forfeiture cases arising under the customs laws, and a comparison of jurisdiction of the common law courts with the jurisdiction of the courts of admiralty. *Id.* 318 U.S. at 137-152. Indeed, in the American Colonies, forfeiture cases were tried by a jury:

> But the vice-admiralty courts in the Colonies did not begin to function with any real continuity until about 1700 or shortly afterward. . . .
>
> By that time, the jurisdiction of common law courts to condemn ships and cargoes for violation of the Navigation Acts had been firmly established, apparently without question, and was regularly exercised throughout the Colonies. In general the suits were brought against the vessel or article to be condemned, were tried by jury, closely followed the procedure in

> Exchequer, and if successful resulted in judgments of forfeiture or condemnation with a provision for sale.

Id. 318 U.S. at 139-140. One commentator's explanation of why a ship was the "offender" in *in rem* proceedings also shows that the Framers understanding of an *in rem* proceeding may have differed from what our understanding is today:

> [T]he rationale of personality and "animation" given for bringing an action against the ship is nothing but a rationalization of a procedure of very long standing in the law of Admiralty which is rooted in the essential condition of maritime traffic, namely, that it functions largely in areas – the oceans – where sovereignty either does not exist, or is in dispute, and it is (or was) the case more often than not, that the owner of a vessel – or sometimes even the crew – was not reachable by the laws of any nation against which some offense or injury was alleged on the part of that vessel and its owners. The vessel alone, and its cargo, were usually all that could be seized for the satisfaction of any claim or as a forfeiture for any offense. Thus, very early in maritime law as Holmes acknowledges (p. 27) "the ship was not only the source, but the limit, of liability," since, to do otherwise, would have amounted to placing in greater jeopardy such shipowners who were citizens or residents of the country seeking the forfeiture.

See Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 Temp. L.Q. 169 (1973).

In *United States v. 92 Buena Vista Avenue, Rumson, New Jersey*, 507 U.S. ___, 113 S.Ct. 469 (1993) Justice Stevens enumerates various types of seizure and forfeitures of tangible property throughout the history of the country,

such as the seizure and forfeiture of "ships and cargos involved in customs offenses," "ships engaged in piracy," and "distilleries and other property used to defraud the United States of tax revenues from the sale of alcoholic beverages," *Id.* 113 S.Ct. at 479-480. Apparently, prior to the Court's decision in *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642 (1967), "the Government had power to seize only property that ' "the private citizen was not permitted to possess." ' " *United States v. 92 Buena Vista Ave.*, 113 S.Ct. at 480. Moreover, before the 1978 amendment to the *Comprehensive Drug Abuse Prevention and Control Act of 1970*, 84 Stat. 1236, which authorized the seizures and forfeiture of proceeds of illegal drug transactions, the original forfeiture provisions had "authorized forfeiture of only the illegal substances themselves and the instruments by which they were manufactured and distributed." *Id. U.S. vs. 92 Buena Vista Ave.*, 113 S.Ct. at 481. Thus, "[t]he original forfeiture provisions of the 1970 statute had closely paralleled the early statutes used to enforce the customs laws, the privacy laws, and the revenue laws; they generally authorized the forfeiture of property used in the commission of criminal activity, and they contained no innocent owner defense. They applied to stolen goods, but they did not apply to proceeds from the sale of stolen goods. *Id.* 113 S.Ct. at 481. Consequently, it is apparent that the forfeiture law with which the Framers were familiar was quite different from the forfeiture provisions of 21 U.S.C. §§ 881(a)(4) and 881(a)(7). Also different than the forfeiture law of the past is the concept of the "innocent owner defense." Although under common law "it was irrelevant whether the owner of the object was innocent of any wrongdoing," Resp. Br. 17, both § 881(a)(4) and § 881(a)(7) contain "innocent owner" defenses.

Petitioner does not argue that *in rem* forfeitures are "anachronistic" or "superstitious." *In rem* forfeitures and the historical application of the doctrine are appropriate in instances where "means of transportation employed in violations of the laws involved . . . are peculiarly adapted to such type of work as, for instance, high-speed powerboats, fast cars with secret compartments, and aircraft." Resp. Br. 22. "If such means of transportation are not forfeited, they will be readily available for future violations[,]" Resp. Br. 22, because they are adapted for such use. Vessels, vehicles and aircraft which are, in fact, "the operating tools of dope peddlers," Resp. Br. 22, are offending property within the historical context of *in rem* forfeiture; and they deserve to be forfeited.

Petitioner's mobile home and auto body shop were not adapted for use in the drug trade. It is clear that Petitioner has been further punished by the forfeiture of his home and business; and it is hard to believe that Petitioner's gun filled with bird shot that he used to shoot sparrows is one of the "well-known tools of the narcotics trade," or that this posed "the very threat with which Congress was concerned." Resp. Br. 24.

The government does not believe that there is any historical support for the application of the Excessive Fines Clause to *in rem* forfeitures. Resp. Br. 24-25. The historical basis for the Excessive Fines Clause, however, indicates that the Framers' concerns in drafting the Eighth Amendment were the very losses faced by Petitioner in this case. The *in rem* forfeitures under 21 U.S.C. §§ 881(a) and 881(a)(7) are more akin to "amercements" and "fines" as they were understood by the Framers than the *in rem* forfeitures which took place in Colonial America under the common law. The *in rem* forfeitures of today under 881(a)(4) and 881(a)(7) were the "amercements"

and "fines" of which the Framers were aware when they drafted the Excessive Fines Clause.

The history of the Excessive Fines Clause establishes that the Framers did not intend to limit the Eighth Amendment to criminal proceedings. *Browning-Ferris Industries, supra,* 492 U.S. at 294 (O'Connor concurring and dissenting). That history also establishes that the Framers' understanding of the word "fine" was that it was the equivalent of the word "amercement." *Id.* 492 U.S. at 289 (O'Connor, concurring and dissenting). The Framers understood that Magna Carta limited the use of amercements by requiring that the amount of the amercement be proportioned to the wrong and that it not be so large as to deprive a person of his livelihood. *Id.* 492 U.S. at 271, 109 S.Ct. at 2918. Petitioner's forfeited auto body shop was the equivalent of the Free-man's contenement or the villain's wainage, the forfeiture of which Magna Carta prohibited.

In considering the scope of the Excessive Fines Clause, as in other Eighth Amendment contexts, this Court looks "to the origins of the Clause, and the purposes which directed its framers." *Browning-Ferris Industries, supra,* 492 U.S. at 264, n.4. But the Excessive Fines Clause should also be interpreted in light of the changes in society, specifically, the changes in the texture and applicability of *in rem* forfeiture:

> [A]s the Court's jurisprudence under the Cruel and Unusual Punishments Clause indicates, its approach has not relied on history to the same extent when considering the scope of the Amendment. See *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion) ("The Amendment must draw its meaning from the evolving standards of

> decency that mark the progress of a maturing society").

Browning-Ferris Industries, supra, 492 U.S. at 264 n.4.

II. THE COURT'S ANALYSES IN *MENDOZA-MARTINEZ* AND *HALPER* CLEARLY ESTABLISH THAT CIVIL FORFEITURE UNDER 21 U.S.C. § 881(a)(4) and 881(a)(7) IS PUNISHMENT.

Notwithstanding the government's attempt to refocus the debate on the past history of forfeitures generally, and upon the pervasive social ills attributed to drug activity, the Court's holding in *United States v. Halper,* 490 U.S. 435 (1989), and the factors it cited as instructive in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), are helpful in showing that application of the specific forfeiture provisions in sections 881(a)(4) & (7) is in fact punitive. The practical focus of *United States v. Halper,* upon "the purposes *actually served* by the sanction in question, not the underlying nature of the proceeding," *id.* at 447 n.7, and upon "a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve," *id.* at 448, provides the appropriate framework for this analysis: "Simply put, a civil as well as a criminal sanction constitutes punishment *when the sanction as applied in the individual case serves the goals of punishment.*" *Id.* (emphasis supplied).

In *Mendoza-Martinez, supra,* the Court recognized that, although the inquiry could be difficult and even elusive, seven objective factors, which are neither exhaustive nor dispositive, are at least useful:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding or scienter, whether its operation will promote the traditional aims of punishment – retribution and

> deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. at 168-169 (footnotes omitted). Although Respondent cited these seven factors in its brief, its application of them to this case (Resp. Br. 26-32) was disingenuous. Instead of applying these factors to the specific forfeiture provisions relevant to Petitioner's loss, Respondent concentrates, almost exclusively, on forfeitures in general and then begs the question by asserting that section 881 simply provides a remedy for the societal ills caused by criminal drug activity. This illusory analysis resulted in Respondent simply concluding that "the sanction of forfeiture imposes no 'affirmative disability or restraint' on the property's owner," and that "scienter is irrelevant to an *in rem* forfeiture." (Resp. Br. 27-28). In a similar fashion, Respondent carefully avoids discussion of §§ 881(a)(4) & (7), as applied to Petitioner, positing instead that section 881(a) as a whole must be viewed as solely remedial.

Many of the subsections under section 881(a) are indeed remedial, in whole or in primary part.[1] As Congress extended the reach of civil forfeitures under this section, however, the broad application of sections

[1] For example, the forfeiture of the substances, materials and assets directly connected with the drug trade in subsections (1), (2), (3), (5), (6), (8), (9), (10) and (11) clearly appear to fit within a remedial scheme.

881(a)(4) & (7) often have both a penal purpose and effect, as demonstrated here.

The forfeitures exacted under §§ 881(a)(4) & (7) clearly act as an affirmative disability or restraint on Petitioner. As these sections were applied here, the forfeiture did not simply confiscate illegal property, or property specifically designed to perpetuate drug use and distribution, such as specially equipped vehicles, or conveyances like airplanes and ships designed for multiple transports of cargo, or specially designed storage or manufacturing facilities – forfeiture of which would clearly seem remedial. Rather, the broad scope of forfeiture under these sections resulted in the forfeiture of Petitioner's mobile home and business, neither of which were intrinsically, in themselves, designed to promote the drug trade – with the primary purpose and effect of disabling not drug activities, but him individually. He was in fact affirmatively disabled both in practical terms – loss of his habitat and employment – and economically, by loss of essentially everything he owned. Thus, even positing that this forfeiture is consonant with Congress' intent and a legitimate legislative end in the sanctioning of drug activity, it is not strictly remedial, as Respondent contends.

Nor did Congress intend it to be simply remedial. The express purpose of these sections, and particularly section 881(a)(7), is general disablement and deterrence. The legislative history shows, for example, that Congress specifically intended to enact section 881(a)(7) as an expansion of forfeiture aimed to deter, punish and economically disable the individual involved in drug trade. S. Rep No 225 98 Cong. 1st Sess 195, reprinted in 1984 U.S. Code Cong. & Admin. News, 3182, 3374 & 3378. (Pet.

Br. 29-30). Insofar as these two sections promote forfeiture of assets directly connected to the drug trade, their effect would be remedial; but, when the disability is incidental to the property and drug activity, as in Petitioner's case, the application of these sections serve to punish the individual.

The government's refusal to concede (or to even discuss) the fact that operation of these sections in this case promotes the traditional aims of punishment – retribution and deterrence – is similarly alarming. It simply strains logic to suggest that the forfeitures under these circumstances are only in remediation of drug activity. The acts of Petitioner could have taken place anywhere, and they were not conditioned on whether or not he was a renter, an owner, or a street dealer: the crime, in fact, was not dependent on the property forfeited or his interest in it; that was incidental. Obviously, a criminal, so inclined and undeterred, would simply sell at another location. In essence, the aim and effect of the statute applied in this case was primarily one of deterrance, not remediation. As discussed above, Congress specifically added § 881(a)(7) to further the deterrence aspect of the law. Moreover, this Court has recognized the punitive and deterrent purposes of the Puerto Rican forfeiture statutes that were modeled after § 881(a)(4) (before the innocent owner exception was added):

> Plainly, the Puerto Rican forfeiture statutes further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents. Forfeiture of conveyances that have been used – and may be used again – in violation of the narcotics laws fosters the purposes served by

> the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-687 (1974) (citing footnote 25, omitted).

Finally, the forfeiture of Austin's legitimate business also had a retributive effect of an enduring nature. Unlike civil remedies that are applied in at least some rough proportion to the direct harm caused, application of this forfeiture as applied to Petitioner deprived him not only of his property, but also of his ability to legally make a future living at his body shop on a continuing basis.[2]

Respondent also summarily dismisses the scienter factor as irrelevant to an *in rem* forfeiture. (Resp. 28). While arguably correct for forfeitures generally, and to several other subsections of § 881(a), that bald assertion is erroneous with respect to sections 881(a)(4) & (7). Both sections contain innocent owner exceptions that preclude forfeiture based on lack of knowledge of the owner. These statutory provisions go beyond the Court-fashioned innocent owner provision in *Calero-Toledo*, where the Court held that an owner may have a constitutional due process claim if he "proved not only that he was uninvolved in and unaware of the wrongful activity, but *also that he had done all that reasonably could be expected to prevent the proscribed use of his property.*" *Calero-Toledo v. Pearson Yacht Leasing Co., supra* at 689. (emphasis supplied). The §§ 881(a)(4) & (7) statutory exceptions, however, take

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[2] You take my house, when you do take the prop
That doth sustain my house. You take my life
When you do take the means whereby I live.
–William Shakespeare, The Merchant of Venice, act IV sc. I, 11 374-376

innocent ownership beyond the tort concept of negligence and impose a knowledge requirement that property is used or intended for use to facilitate drug crimes under the Act.

The behavior to which a forfeiture applies under §§ 881(a)(4) & (7) is also strongly tied to criminal activity. Forfeiture under § 881(a)(4) must relate to substances, materials, or equipment in § 881(a)(1), (2) or (9) that violate the criminal drug statutes under the act. Forfeiture under § 881(a)(7) is premised on acts that constitute a violation of the criminal laws punishable by more than one year's imprisonment. The inclusion of innocent owner exceptions in both sections, based on the owner's knowledge, and the administrative procedures for remission and mitigation of the forfeiture, § 881(d), further evidences an intent that forfeitures under these sections are designed for those suspected of conducting or fostering criminal behavior.

In presumably addressing the inquiry of "whether an alternative purpose to which it may rationally be connected is assignable for it." Respondent argues, again without specifically discussing 881(a)(4) and (7), that section 881(a) remedies social problems in two ways:[3] First,

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[3] Respondent's amici attempt, in various other ways, to tie application of § 881(a) forfeitures to the broad, all encompassing remedial goals of securing compensation for (1) those victims injured by criminal drug activities, and (2) the collective injuries visited upon society as a consequence of drugs in general. If sections 881(a)(4) & (7) can be used to visit all of the burdens that a government may associate with drug activities upon the property of each individual drug offender, such as Petitioner, then that purpose clearly appears excessive in relation to purely remedial goals. As the Second Circuit Court of Appeals noted in *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 37 (2nd Cir. 1992):

> While we are extremely sympathetic to the need to address our nation's serious narcotics problems, we do not believe that a disproportionately large forfeiture can be reasonably justified as a civil fine as opposed to punishment by placing full responsibility for the "war on drugs" on the shoulders of every individual claimant. This is particularly so where the individual claimant's violations are relatively minor. *See 38 Whalers Cove Drive*, 747 F.Supp. at 180; *see also Halper*, 490 U.S. at 449, 109 S.Ct. at 1902 (compensable portion of the 'costs and damages' suffered by the government was that directly caused by the defendant. . . . "

Id. at 37.

it removes the instruments used by drug traffickers to ply their trade, thereby protecting and preventing danger to the community. Second, forfeited assets help fund law enforcement activities. (Resp. Br. 32). Here, however, the government did not remove any instruments of the drug trade that were endangering the community. Moreover, the case of *United States v. Salerno*, which Respondent cites in support, is materially different. The prevention of danger to the community, underlying the Bail Reform Act in *United States v. Salerno*, 481 U.S. 739, 747 (1987), was narrowly circumscribed based on specific individualized factors, which "carefully limited the circumstances under which detention may be sought to the most serious of crimes," only after a full hearing, and "within the stringent time limits of the Speedy Trial Act." *Id.* at 747. Thus, *Salerno* does not support the open-ended, all encompassing remedial goal of protection that Respondent argues for here.

Nor does the fact that the government has a pecuniary interest in the forfeitures to fund law enforcement

activities, as discussed in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629, make application of sections 881(a)(4) & (7) any less punitive to Petitioner. Obviously the use of assets forfeited for punitive reasons can be ultimately used for remedial ends; but that does not change the fact that the underlying purpose and effect of that sanction is in fact to deter and economically disable.

Finally, *United States v. Ward*, 448 U.W. 242 (1980), is of little assistance, both factually, and in light of the Court's subsequent decision in *Halper*. *In Ward*, the fines imposed were assessed after an evidentiary hearing, which applied particularized factors relating to the business involved and the gravity of the violation. *Id.* at 245. Unlike the instant case, the purpose of the civil fines was specifically designed to assist in clean-up operations. As the majority noted, in distinguishing *Boyd v. United States*, 116 U.S. 616 (1886) and its progeny of forfeiture cases, "Boyd dealt with forfeiture of property, a penalty that had absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." *Id.* at 254.

Respondent argues that *Halper* stands for the proposition that where the civil penalties assessed under the statute serve *no* remedial purpose, they then constitute punishment. (Resp. Br. 33).[4] That reading is too narrow. Rather, after first reviewing the fact that retribution and deterrence, the "traditional aims of punishment," are not "leigtimate nonpunitive governmental objectives," the Court recognizes that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can

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[4] Respondent cites *Halper* as "[f]inding that the civil penalties assessed under the statute served no remedial purpose," and that the civil sanction in *Halper* ' "may not fairly be characterized as remedial, but *only* as a deterrent or retribution.' " (Resp. Br. 33). The government left out the phrase "to the extent that" the sanction may not fairly be characterized as remedial. *Halper, supra*, 490 U.S. at 449.

be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 448. Thus, when a civil penalty exceeds the compensatory interest, or loss, to the government, it is punishment in "the plain meaning of the word." *Id.* at 449. Significantly, the Court clearly spoke of the government's loss or compensatory interest in terms of the particular damages and losses it sustained in this particular case, not all fraud cases in general. *Id.* The Court also distinguished this case from *United States ex rel. Marcus v. Hess*, noting that in *Hess* "[s]ince proceedings under the stature were remedial and designed to 'protect the government from financial loss' – *rather than to 'vindicate public justice'* – they were civil in nature. *Id.* at 444.

Applying the *Halper* analysis to the facts in Petitioner's case, it is also beyond peradventure that the civil forfeiture sanction as applied here "serves the goals of punishment." *Id.* at 448. Even if some remedial purpose could be ascertained from the government's forfeiture of Petitioner's property, there is no doubt that the civil forfeiture in this case *also* served "either retributive or deterrent purposes." *Id.* Congress expressly recognized this as a purpose of the sections applied here, and that application is indeed punishment within the plain sense of the word.

Although *Halper* dealt with the Double Jeopardy Clause, the Court's analysis of the punishment issue should also apply in the context of the Excessive Fines Clause of the Eighth Amendment. That clause too is focused on safeguarding "humane interests"; and the constitutional protections provided by that clause is also "intrinsically personal." "Like the Double Jeopardy Clause, the Eighth Amendment is a 'personal' and 'humane' limitation on the government's ability to punish

an individual." *United States v. 38 Whalers Cove, supra,* at 35. In *Browning-Ferris Industries v. Kelco Disposal, Inc., supra,* decided shortly after *Halper,* the Court also suggested that punitive sanctions by the government, in the context of disabling an individual and raising revenue, could raise Eighth Amendment concerns under a *Halper* analysis:

> Here the government of Vermont has not taken the positive step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual.

Id. at 275. In an accompanying footnote, the Court cited *Halper,* as holding that the Double Jeopardy Clause places limits on the amounts the Federal Government may recover in a civil action, and as implying "that punitive damages awarded to the government in a civil action may raise Eighth Amendment concerns. . . . "). *Id.* at n.21.

Finally, Respondent states that Petitioner is simply wrong in asserting that civil forfeitures present the same possibilities for abuse as criminal fines. (Resp. Br. 25-26). In fact, however, forfeiture presents more opportunity for abuse. Because of the procedural laxities of civil forfeiture, coupled with the potential for quickly raising large sums through the taking of whole assets, in values that far exceed what a fine might raise, law enforcement efforts have recently placed a decided emphasis on seizing property to do just that – raise money. In order to maximize seizures of property and generate revenue. Justice Department lawyers are grouped into "Asset Forfeiture Units," directed to increase production of forfeitures, and even reassigned from criminal matters to help generate funds. Maveal, *The Unemployed Criminal Alternative In The Civil War Of Drug Forfeitures,* 30 Am. Crim. L. Rev. 35,

49-50.[5] With that type of emphasis and financial incentive, law enforcement reportedly takes a strange twist:

> Forfeiture laws can create fiscal incentives that distort law enforcement. Florida drug agents working the I-95 cocaine corridor reportedly try to stop suspected drug buyers on their way south, while they still have forfeitable cash; on the northern route, the crooks simply have drugs, which are worthless to the narcs. Cary Copeland, director of the Justice Department's Office for Asset Forfeiture, acknowledges problems, but lauds the program as a revenue raiser. "This is the goose that lays the golden egg."

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[5] This article cites, as an example, an August, 1990, Attorney General bulletin warning U.S. Attorneys that "the Department was far short of its projections of $470 million in forfeiture deposits . . . :

> We must significantly increase production to reach our budget target. . . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.

EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, 38 U.S. ATTORNEY'S BULLETIN 180 (Aug. 15 1990)." *Id.* at p. 49, n.70.

It also cites a June, 1989, bulletin from "Acting Deputy Attorney General Edward S.G. Dennis Jr. [advising] all United States Attorneys that they must make all forfeiture cases 'current,' meaning doing all that could be done to advance the case for judicial action. 'If inadequate forfeiture resources are available to achieve the above goals, *you will be expected to divert personnel from other activities* or to seek assistance from other U.S. Attorney's offices, the Criminal Division, and the Executive Office for United States Attorneys.' EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, 37 U.S. ATTORNEY'S BULLETIN 214 and Exhibit A (July 15, 1989)." *Id.*, at 50, n.71 (emphasis supplied).

No. 92-6073

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

RICHARD L. AUSTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the Eighth Amendment applies to civil forfeitures and, if so, whether the forfeiture of petitioner's mobile home and automobile body shop is grossly disproportionate to the seriousness of his offense.

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INTEREST OF THE AMICUS

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 7,000 attorneys and 28,000 affiliate members, including representatives from every state. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in its House of Delegates.

The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the field of

criminal practice, and to encourage the integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice.

The NACDL has long been troubled by the ever expanding use of civil forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness and wisdom of some of these laws and the aggressive way they are being used by federal and state prosecutors to inflict punishment without any of the constitutional and procedural protections afforded to criminal defendants.

The single biggest problem with civil forfeitures is that the penalty is inherently likely to be disproportionate to the seriousness of the conduct giving rise to forfeiture. This problem is aggravated by the current system which earmarks forfeited property to support law enforcement efforts — so that enforcement agencies have a powerful economic incentive to seek disproportionately severe forfeitures.

This case affords the Court its first opportunity to place constitutional restraints on the Government's ability to obtain civil forfeitures that are grossly disproportionate to the seriousness of the property owner's misconduct. Consequently, the NACDL has a vital interest in the outcome of this case.[1]

SUMMARY OF ARGUMENT

1. The Eighth Amendment explicitly prohibits the imposition of "excessive fines." The Excessive Fines Clause has a different historical origin and purpose than the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Excessive Fines Clause proscribes excessive, *i.e.*, grossly disproportionate, economic penalties sought by the Government.

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk pursuant to Rule 36.3 of the Rules of this Court.

Sound policy reasons as well as the history of Anglo-American law support this interpretation of the Clause. As Justice Scalia observed, "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." *Harmelin v. Michigan*, 111 S.Ct. 2680, 2693 n.9 (1991). Because the Government stands to benefit, it makes sense to scrutinize governmental action more closely when it seeks an economic penalty.

This policy concern is particularly acute with respect to forfeiture penalties because under a federal law enacted in 1984 all revenue raised through forfeiture is allocated exclusively for law enforcement purposes.

Despite these easily understood incentives for abuse, the Department of Justice has refused to exercise any control over prosecutorial decisionmaking in this area. Thus, each U.S. Attorney retains unfettered discretion to pursue forfeitures under statutes that are extremely broad. This has resulted in many forfeitures that are, by any reasonable standard, disproportionately severe.

2. Civil forfeitures are "fines" within the meaning of the Eighth Amendment. This Court has stated that, from a constitutional standpoint, there is no difference between fines and forfeitures. Where the Government uses a nominally civil proceeding to confiscate property for the purpose of raising revenue or disabling some individual, Eighth Amendment protections apply. Here, the obviously punitive character of the forfeiture sanction also militates in favor of requiring Eighth Amendment safeguards. While some civil forfeitures may properly be characterized as "remedial," notably forfeiture of criminal proceeds, forfeitures of homes and businesses under 21 U.S.C. § 881(a)(7) based on the theory that they in some manner "facilitated" a drug crime are plainly punitive.

The *in rem* nature of a civil forfeiture proceeding does not obviate the need for constitutional analysis of the forfeiture penalty. Civil forfeitures should not be consigned to a constitutional netherworld where all abuses must be tolerated because in theory the action is against "the offending thing." Rather, the Court should focus on the effect of the forfeiture upon the property owner, as indeed, this Court has always done.

3. This case should be remanded to the trial court for a hearing to determine whether the forfeiture penalty imposed on petitioner, together with his seven year prison sentence, is grossly disproportionate to the seriousness of his offense. Rather than attempting to formulate a test for disproportionality, this Court should merely suggest some of the factors it considers relevant to that determination, as the Third Circuit recently did in *United States v. Sarbello*, No 91-5327 (3d Cir. Feb. 2, 1993).

ARGUMENT

I. THE EIGHTH AMENDMENT APPLIES TO CIVIL FORFEITURES.

1. The Eighth Amendment explicitly provides that "excessive fines" shall not be imposed. This Court has traced the prohibition against excessive fines all the way back to the Magna Carta. Although the members of this Court are divided on the scope and purpose of the Cruel and Unusual Punishments Clause, there is — or ought to be — broad agreement that the Excessive Fines Clause has a different historical pedigree and a different sphere of action than the Cruel and Unusual Punishments Clause. Within its proper sphere, *i.e.*, economic penalties for criminal activity, the Excessive Fines Clause clearly prohibits "excessive" penalties. A more difficult question is what the word "excessive" means in this context. It could be taken to prohibit fines and other economic penalties that are not strictly proportionate to the offense. However, it seems more plausible — and it is certainly more practical — to interpret the

Excessive Fines Clause as proscribing only economic penalties that are *grossly* disproportionate to the seriousness of the misconduct that incurs the penalty.

Sound policy reasons support this interpretation of the Excessive Fines Clause. As Justice Scalia observed in *Harmelin v. Michigan*, 501 U.S. ___, 111 S.Ct. 2680, 2693 n.9 (1991), "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." While incarceration costs the Government money, "fines are a source of revenue." And "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Id.*

Under a federal law enacted in 1984, forfeited assets no longer go into the general Treasury. Instead, the property (or the money derived from its sale) is allocated exclusively for law enforcement purposes. *See* 28 U.S.C. § 524. This dubious system has now spread to most states as well. It provides an undue incentive to seek forfeiture penalties which are not in the interests of justice solely for the purpose of raising revenue for law enforcement agencies. And this has happened day after day at both the federal and state level. Through the federal Government's "equitable sharing program" the particular state or local police department or sheriff's office that turns seized assets over to the federal authorities for forfeiture is rewarded with up to 85 percent of the money obtained from the sale of the forfeited property. *See* 19 U.S.C. § 1616; Attorney General's Guidelines on Seized and Forfeited Property. The Justice Department has shared around one billion dollars with state and local police agencies since the equitable sharing program began in 1985. On the state level, many prosecutors' offices are also being heavily funded with forfeiture revenues.[2] So not only

[2] Oklahoma County District Attorney Bob Macy recently was quoted in the press blaming his office's budget shortfall on declining revenues from forfeiture cases. The office's budget was $3,365,587 in 1992, of which

police agencies but even prosecutors are in thrall to a reward system that resembles bounty-hunting.[3] Accordingly, the concerns expressed by Justice Scalia in *Harmelin* are particularly acute in the forfeiture area.

Given the incentives for abuse, the Department of Justice should long ago have issued guidelines to place some limits on prosecutorial discretion in seeking civil forfeitures. But, despite mounting criticism, the Department has steadfastly refused to exercise any control over prosecutorial decisionmaking in this area. Each U.S. Attorney retains unfettered discretion to seek forfeiture pursuant to statutes that are extremely broad in scope. 21 U.S.C. § 881(a)(7) is not the only such statute. The Government has sought civil forfeiture of entire businesses under 18 U.S.C. § 981 in cases where the owner of the business violated the "money laundering" statutes, for example, by skimming cash receipts and depositing the money in a company account.

$350,000 came from forfeitures. In 1991, forfeitures accounted for $685,730 in funding for the office. Macy blamed the decline in his forfeiture revenues on local police agencies who chose to turn their forfeiture cases over to the federal authorities so the police could get a larger share of the property than they would in state court, where the loot has to be shared with the prosecutor's office. "Macy Seeks Ways To Handle Budget," *The Daily Oklahoman*, January 1, 1993, p. 19. Macy is the current President of the National District Attorneys Association (NDAA).

[3] The incentives for abuse are not merely pecuniary. United States Attorney's offices are given more prosecutor slots based on the number of cases brought in the previous year. The Department of Justice considers forfeiture statistics in deciding how many slots to allocate to each office. U.S. Attorney's offices in areas with little serious criminal activity, such as South Dakota, are typically overstaffed for political reasons. Those offices have an incentive to pursue forfeitures that are not in the interest of justice in order to "justify" their high staffing levels. The United States Attorney's Office for the District of South Dakota has sought Draconian forfeitures in cases involving minor drug activity. *See* "Where the Innocent Lose," *Newsweek*, January 4, 1993, p. 42. This article emphasizes that while "[m]ost forfeiture victims aren't exactly model citizens, . . . the penalty they suffer often far exceeds the alleged misdeed."

See 1 D. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶5.01[1], at 5-10 (Dec. 1992 ed.). 18 U.S.C. § 981 and the "money laundering" statutes are so broadly written that they positively invite prosecutorial overreaching. *See also* John K. Villa, *Banking Offenses*, Ch. 6 & 8 (1991). So-called "money laundering" can be charged in almost any federal criminal case and drastic forfeiture consequences ensue. Despite a long record of abusive prosecutions under these statutes, Congress keeps expanding them at the Department's behest rather than cutting back.

The Department of Justice can avoid disproportionately severe forfeitures through the administrative remission and mitigation process. However, the remission and mitigation process has atrophied in the past decade. The Department of Justice's enforcement policies have instead become harsher and harsher. Relief is so rarely granted to anyone except banks and wholly innocent lienholders that knowledgeable attorneys consider it a waste of time to seek remission or mitigation of the forfeiture penalty. It may be that because of the change in Administration and the increasing criticism of its forfeiture efforts, the Department is now going to use the remission and mitigation process to better effect. We certainly hope so. *See* 2 D. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶15.04. However, even if this happens, we have learned from sad experience that the administrative clemency process is no substitute for constitutional or statutory safeguards against abuse.

The Court should not underestimate the importance of an Eighth Amendment excessiveness analysis in curbing potentially abusive *state* forfeiture proceedings. Though excessive federal forfeitures may well have been tempered by the professionalism of U.S. Attorneys' offices, the monetary success of federal forfeiture has interested states in expanding their forfeiture statutes. We have not yet experienced the full wrath of an

"updated" approach to state forfeitures. For example, one model state forfeiture law, authored by the National Drug Prosecution Center in 1991 and currently being pushed in numerous cash-starved state legislatures, would permit the state to forfeit any of a drug smuggler's property up to the value of the commercial airliner on which the smuggler purchased a ticket to travel.[4] The Eighth Amendment must remain available to protect against these excesses on the horizon.

2. We think it obvious that civil forfeitures are "fines" within the meaning of the Eighth Amendment. In *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971), this Court stated:

> From the relevant constitutional standpoint there is no difference between a man who "forfeits" $8,674 because he has used the money in illegal gambling activities and a man who pays a "criminal fine" of $8,674 as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force.

If there is no difference between civil forfeitures and fines for Fifth Amendment purposes, it is difficult to see how there could be a difference between civil forfeitures and fines under the Excessive Fines Clause of the Eighth Amendment.

In *Browning Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271-76 (1989), the Court held that punitive damages obtained in a private civil action were not "fines" within the meaning of the Eighth Amendment. However, the Court reached that result precisely because the *Govern-*

[4] National Conference of Commissioners on Uniform State Laws, *Draft Amendments to the Uniform Controlled Substances Act*, prefatory note at 7 (Dec. 4, 1992) (criticizing National Drug Prosecution Center, *Model Asset Seizure and Forfeiture Act* § 14(a) & comment (1991)).

ment was not the plaintiff and there was no incentive for the State to abuse the punitive damages remedy. The Court emphasized that the Government of Vermont had not "taken a positive step to punish, as it most obviously does in the criminal context, *nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual.*" 492 U.S. at 275 (emphasis supplied). *See Harmelin v. Michigan, supra*, 111 S.Ct. at 2693 n.9. Here, the reasoning of *Browning Ferris Industries* supports the contrary result. The Government is the plaintiff and there is a tremendous and easily understood "incentive for abuse." *Id.*

The lower courts are in agreement that the Eighth Amendment applies to criminal forfeitures. A criminal forfeiture may be imposed only after the criminal defendant is convicted of a crime triggering the forfeiture. All of the procedural safeguards of the criminal process apply to criminal forfeitures. Because the Government's burden of proof in a federal civil forfeiture case is merely to show probable cause — the courts have held that that minimal burden may be met entirely with rank hearsay evidence — and because claimants in a civil forfeiture proceeding do not have the procedural rights afforded a criminal defendant (including the right to appointed counsel if one is indigent) the chance that justice will miscarry is much greater in the civil than in the criminal forfeiture context. It is therefore all the more important that some constitutional protection be provided against disproportionately severe civil forfeitures. *United States v. On Leong Chinese Merchants Ass'n Building*, 918 F.2d 1289, 1299 (7th Cir. 1990), *cert. denied*, 112 S.Ct. 52 (1991) (Cudahy, J., concurring) ("It would defy common sense to prohibit disproportionate forfeiture of the property of a defendant who has been convicted of a criminal violation while placing no limits on the power of the government to seize any real estate related to an offense in an ostensibly civil *in rem* action"). *See also United States v. $12,390*, 956 F.2d 801, 807-12 (8th Cir. 1992) (Beam, J. dissenting).

Like the Double Jeopardy Clause, which this Court held applicable to civil penalties in *United States v. Halper*, 490 U.S. 435 (1989), the Eighth Amendment is a "personal" and "humane" limitation on the power of the Government to punish an individual. As such, it should also be applicable to civil forfeiture sanctions that are punitive in nature. *United States v. Certain Real Property and Premises Known as 38 Whalers Cove*, 954 F.2d 29, 35 (2d Cir. 1992). *See also In re Winship*, 397 U.S. 358, 365-66 (1970) (the Court declined to allow the state's "civil labels and good intentions" to "obviate the need for criminal due process safeguards in juvenile courts.").

3. The Eighth Circuit panel urged Congress to enact statutory safeguards against disproportionately severe civil forfeitures pursuant to 21 U.S.C. § 881(a)(7)[5] but it mistakenly believed that the Eighth Amendment does not apply to civil forfeitures. The court of appeals adopted the reasoning of a Ninth Circuit case holding that the Eighth Amendment was not applicable to an *in rem* forfeiture because the proceeding is, in theory, against the "offending" property, not the owner of the property. The court reasoned that "'[i]f the constitution allows *in rem* forfeiture to be visited upon innocent owners ... the constitution hardly requires proportionality review of forfeitures ...'" 964 F.2d at 817, quoting *United States v. Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989).

The court of appeals plainly thought the Eighth Amendment should apply to civil actions brought by the Government that result in harsh penalties. And the court agreed with the Ninth Circuit that it is incongruous to "'require[] proportionality review for forfeitures when the government proceeds *in personam*, but not when the government proceeds *in rem*.' Legal

[5] We have no expectation that the Congress would be willing to provide statutory safeguards against abuse of this or any other civil forfeiture statute. Few members of Congress are knowledgeable about forfeitures and there is a widespread reluctance to pass legislation that could expose members to criticism, however unfounded, that they are "soft" on crime.

niceties such as *in rem* and *in personam* mean little to individuals faced with losing important and/or valuable assets." *Id.* at 817-18, *quoting United States v. Tax Lot 1500, supra*, 861 F.2d at 234.

Nonetheless, the court thought itself constrained "by the technical legal distinctions regarding *in personam* and *in rem* actions" and by the decisions of other circuit courts holding that the Eighth Amendment does not apply to *in rem* civil forfeitures. 964 F.2d at 818.[6]

The court of appeals erred in holding that the ancient fiction that a civil forfeiture action is against the offending property, rather than against the owner of the property, prevents proportionality principles from being applied. This Court has repeatedly rejected the same argument in holding that other constitutional protections do apply to *in rem* civil forfeiture proceedings. Thus, the Court has held that the evidence seized in violation of the Fourth Amendment must be excluded from civil forfeiture proceedings which are quasi-criminal in nature, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), and that the Fifth Amendment privilege against compelled self-incrimination applies in the *in rem* civil forfeiture context, *United States v. United States Coin & Currency*, 401 U.S. 715, 718-22 (1971); *Boyd v. United States*, 116 U.S. 616 (1886).

In holding that Eighth Amendment protections apply to civil forfeitures, the Second Circuit rejected the notion that the

[6] The court of appeals was not aware of the then recent decision of the Second Circuit in *United States v. Premises Known as 38 Whalers Cove*, 954 F.2d 29 (2d Cir. 1992), which held that Eighth Amendment protections do apply to civil forfeiture proceedings. The decisions from other circuit courts addressing this issue contain little or no analysis and either antedate this Court's decisions in *Halper*, *Browning Ferris Industries* and *Harmelin* or ignore those decisions. *See* 2 D. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶13.05.

in rem character of the proceedings obviates the need for constitutional analysis of the penalty. The Second Circuit stated:

> In evaluating whether a forfeiture under 881(a)(7) serves its ostensible goals, we focus upon the effects on the claimant who has violated the statute, despite the fact that the forfeiture actions are brought *in rem*. *See Livonia Road*, 889 F.2d at 1270. *See also U.S. v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980) (for Eighth Amendment purposes, "there is no substantial difference between an *in rem* proceeding and a[n *in personam* criminal] forfeiture proceeding brought directly against the owner"); *cf. United States v. U.S. Coin & Currency*, 401 U.S. 715, 718, 91 S.Ct. 1041, 1043, 28 L.Ed.2d 434 (1971).

38 Whalers Cove, 954 F.2d at 36.

4. We recognize that there is some tension between this Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and the proposition we advance here. In *Calero-Toledo* the Court held that an innocent party could be deprived of its property without contravening the Just Compensation Clause of the Fifth Amendment. Although the Court's opinion does not discuss the nature of the offense that resulted in the seizure of the yacht, Justice Douglas' dissent states that a single marijuana cigarette was found on board. He also emphasized that there was no evidence the yacht leasing company was negligent. 416 U.S. at 692. In upholding the forfeiture of the yacht, the Court relied heavily upon the personification fiction, *i.e.*, the notion that the property is the offender.

The Court's decision in *Calero-Toledo*, which relies almost entirely on hoary precedent, needs to be reexamined in light of the vastly increased role that civil forfeitures now play in law enforcement. At the time the case was decided "forfeitures appeared to be an obscure backwater of the law. Had the

federal government pursued forfeitures as aggressively then as it does now, the Court might have subjected forfeitures to the same scrutiny as criminal procedure." 1 D. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶1.02, at 1-16. Significantly, 21 U.S.C. § 881(a)(7), the statute that authorizes civil forfeiture of real estate for drug offenses, was not enacted until 1984. In 1974, when the *Calero-Toledo* case was decided, forfeitures were limited to cars, vessels and the occasional airplane used to smuggle drugs. Moreover, neither the federal government nor state authorities pursued a "zero tolerance" policy in forfeiture cases. The facts in *Calero-Toledo*, which arose in Puerto Rico, were unquestionably aberrational at the time.

Moreover, as Judge Aspen has astutely remarked, if the Court's decision in *Calero-Toledo* rests upon the personification fiction then the logic of the constitutional defense to forfeiture carved out by the Court in that case is not readily apparent.[7] "If the *res* really is the offender, then there is no reason to consider the conduct of the property owner. This would indicate that at the edges, at least, the *in rem* fiction begins to break down." *United States v. One 1988 Ford Mustang*, 728 F.Supp. 495, 498 n.2 (N.D.Ill. 1985).[8]

The facts of *Calero-Toledo* may be more troublesome than the Court's reliance upon the personification fiction. If the Eighth Amendment applies to civil forfeitures it would have to, at a minimum, prevent forfeiture of a valuable yacht owned by

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[7] The Court stated that "it would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." 416 U.S. at 688-90.

[8] Judge Aspen also noted the difficulty of reconciling the Court's earlier decision in *Plymouth Sedan* with the personification fiction. In his view, criminal and civil forfeitures should be treated the same way for Eighth Amendment purposes.

an innocent and non-negligent party where the act triggering the forfeiture is the possession on the yacht of a single marijuana cigarette by the owner's lessee. Yet no justice suggested that the forfeiture of the yacht violated the Eighth Amendment. The easy answer is that the yacht leasing company did not raise any Eighth Amendment challenge to the forfeiture.

II. THE CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR A HEARING TO DETERMINE WHETHER THE FORFEITURE PENALTY IS GROSSLY DISPROPORTIONATE TO PETITIONER'S OFFENSE.

Assuming this Court agrees with our view of the Eighth Amendment's scope, the more difficult undertaking is to formulate a coherent test of proportionality. Two recent cases, *38 Whalers Cove*, *supra*, and *United States v. Sarbello*, No. 91-5327 (3d Cir. Feb. 2, 1993) represent the circuit courts' most serious efforts in this regard.

United States v. Sarbello, No. 91-5327 (3d Cir. Feb. 2, 1993), a criminal forfeiture under RICO[9], involved the forfeiture of the defendant's entire interest in API — a legitimate corrugated box manufacturing enterprise. Although the jury found that only 10% of the API assets were criminally tainted, § 1963(a)(3) required forfeiture of Sarbello's entire interest in the business (approximately 67%). Thus the court was faced with the question of whether the Eighth Amendment permits the reduction of an otherwise mandatory 100% statutory forfeiture on the basis of disproportionality.

The Third Circuit held that the Eighth Amendment requires the court to proportion its forfeiture orders to the seriousness of the underlying offense. *United States v. Sarbello*, No. 91-5327, slip op. at 19 (3d Cir. Feb. 2, 1993). Upon the defendant's "*prima facie* showing that the § 1963(a)(2) sentence is grossly

[9] 18 U.S.C. § 1963(a)(3).

disproportionate, or bears no close relation to the seriousness of the crime," some proportionality analysis would be mandated. *Id.* In the court's view, the defendant's *prima facie* showing could be satisfied by a factual determination at the defendant's request, pursuant to Fed. R. Crim. P. 31(e), which would permit a comparison of the defendant's ownership interest and the extent to which the assets were criminally tainted.

The significance of *Sarbello* lies primarily in the Third Circuit's articulation of factors relevant to an Eighth Amendment proportionality analysis. The court explained that although a district court's proportionality analysis will not in every case be extensive or encompass the three factors set forth in *Solem*, it

> must necessarily accommodate the facts of the case and weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach, against the severity of the criminal sanction. Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability, and, of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct.

Id. at 20. Recognizing the need for intensive case-by-case factual determinations, the court remanded so that the district court could conduct a proportionality analysis consistent with its opinion. *Id.* at 23.

While *Sarbello* involved a criminal forfeiture, its articulation of relevant factors is equally applicable to civil forfeitures. However, the factors noted in *Sarbello* should not be regarded as exclusive. For example, where the property owner is also convicted and sentenced to a term of imprisonment and/or a fine his total punishment for the offense should be considered in determining whether the forfeiture penalty sought is grossly

disproportionate. Indeed, the court ought to consider the forfeiture penalty when determining an appropriate sentence. *See United States v. Porcelli*, 865 F.2d 1352, 1366 (2d Cir. 1989); *United States v. Horak*, 833 F.2d 1235, 1252 (7th Cir. 1987); *United States v. Busher*, 833 F.2d 1409, 1415-16 (9th Cir. 1987); *United States v. L'Hoste*, 609 F.2d 796, 813 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980). As Excessive Fines Clause jurisprudence is undeveloped the prudent course in this case is to remand for a hearing on whether the forfeiture of petitioner's mobile home and auto body shop business is grossly disproportionate.

Eighth Amendment proportionality was also addressed by the Second Circuit in *38 Whalers Cove*, a facilitation case under 21 U.S.C. § 881(a)(7). The court recognized that the Eighth Amendment applies to civil forfeitures serving retributive or deterrent purposes rather than remedial goals. *38 Whalers Cove*, 954 F.2d at 35. Analogizing to *Halper*, the court placed the burden upon the claimant to show that the defendant property was not an instrumentality of crime *and* that its total value was "overwhelmingly disproportionate to the value of the controlled substances involved in the statutory violation." Upon a claimant's showing of disproportionality, the Government may then "present its costs of investigation and detection, as well as other costs and damages attributable to the misconduct of the claimant" in rebuttal. *Id.* at 37.

The Second Circuit did not remand and require the government to carry its burden of showing that the forfeiture was justified as civil and remedial in nature. The court remarked that even "assuming *arguendo* that following a government accounting the district judge would conclude that the forfeiture, even up to the full amount of Levin's equity interest in the condominium, amounted to punishment and not a civil sanction, the judgment would still survive scrutiny."[10] *Id.* The Second Circuit's nig-

[10] It is significant to note that although Levin mentioned that the Excessive Fines Clause might apply to purely civil sanctions, he did not sufficiently emphasize that position on appeal. Consequently, the Second Circuit declined to address the issue. 954 F.2d at 38 n.3. Levin's forfeited interest in the residence was close to three hundred times the value of the cocaine ($250) sold inside it.

gardly application of Eighth Amendment principles makes it difficult to imagine what magnitude of disproportionality would fail its test. Although the court identified as relevant the three proportionality factors discussed in *Solem v. Helm*, 463 U.S. 277, 290-92 (1983), its application of those factors was too cursory to be instructive. The court merely observed that "the imposition of the equivalent of a $68,000 fine in this case, while large, is not a grossly disproportionate punishment within the meaning of the Eighth Amendment jurisprudence."

While we do not suggest a specific conclusion as to the proportionality of the forfeiture at issue in *38 Whalers Cove*, we do question the validity of the court's Eighth Amendment proportionality analysis. The court provided no criteria for determining what amounts to an "instrumentality" of crime, though that is its threshold inquiry. Moreover, predicating its rebuttable presumption on a concept of government cost accounting is fraught with practical difficulties. Under the Second Circuit's formulation, the courts might become mired in voluminous time and attendance records for government agents and employees to determine whether a given forfeiture violated a claimant's Eighth Amendment rights. Such an inquiry hardly seems relevant to an assessment of disproportionality. Ultimately, the government's conduct, rather than the claimant's, would determine the magnitude of permissible forfeitures. This is not the "personal" and "humane" limitation on the Government's power to punish embodied in the Eighth Amendment.

This Court should adopt the *Sarbello* approach to adjudicating Eighth Amendment proportionality cases. In contrast to the Second Circuit's approach, the *Sarbello* analysis permits

the district courts, on a case-by-case basis, to determine and weigh factors relevant to proportionality. This methodology is analogous to the approach adopted by Congress and the U.S. Sentencing Commission in § 5E1.2(d) of the United States Sentencing Guidelines concerning "Fines for Individual Defendants".

CONCLUSION

For the foregoing reasons, the NACDL as amicus curiae respectfully urges this Court to reverse the decision of the court of appeals and to remand the case for a hearing to determine whether the forfeiture penalty suffered by petitioner is grossly disproportionate to the seriousness of his offense.

Respectfully submitted,

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February, 1993

NO. 92-6073

In The

Supreme Court Of The United States

OCTOBER TERM, 1992

RICHARD LYLE AUSTIN, PETITIONER

V.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that both parties to this case have been served three copies of the Brief Amicus of National Association of Criminal Defense Lawyers in Support of Petitioner by mail on February 26, 1993.

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No. 92-6073

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD LYLE AUSTIN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Eighth Amendment's guarantee that "excessive fines [shall not be] imposed, nor cruel and unusual punishments inflicted" is applicable to a civil forfeiture imposed on a defendant convicted of the crime of sale of cocaine, as a consequence of that crime.

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by the Constitution and laws of the United States. The ACLU has long worked to protect the rights of criminal defendants, and in particular to secure the constitutional right not to be subjected to cruel and unusual punishment. Toward that end, the ACLU has filed many briefs in this Court, as counsel for a litigant or as *amicus curiae*, in cases involving the interpretation of the Eighth Amendment.

STATEMENT OF THE CASE

On June 13, 1990, Keith Engebretson came to an auto body shop in Garretson, South Dakota, owned by the petitioner Richard Lyle Austin. Austin provided Engebretson with two grams of cocaine, which he apparently retrieved from his nearby trailer or mobile home.[2] The next day, the police searched the body shop and trailer, recovering small amounts of cocaine and marijuana, less than $4000 in cash, some drug paraphernalia, and a .22 caliber pistol. For this transgression, Austin was arrested, pled guilty in state court to one count of possession of cocaine with intent to distribute and, on January 28, 1991, was sentenced to seven years'

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] The consideration, if any, received by Austin in exchange for the cocaine is disputed. The affidavit attached to the government's motion for summary judgment alleges that the cocaine was exchanged "for an unknown amount of money." Cert.Pet. at 5. Austin contended that he received no money from Engebretson. *Id.* at 6.

imprisonment.[3]

This severe sentence, however, was not the end of Austin's punishment. In addition, the United States Attorney filed this civil forfeiture action seeking to forfeit to the United States the auto body shop in which Austin had worked for some 25 years, and the trailer, which constituted Austin's only residence. On April 8, 1991, the district court granted the government's motion for summary judgment. Austin was thus deprived of the business and home to which he had hoped to return after prison.

On appeal to the United States Court of Appeals for the Eighth Circuit, Austin contended that the forfeiture of his home and of his sole means of earning a legitimate income, on the facts of this case, violated the Eighth Amendment. The court of appeals did not address whether the forfeiture of virtually all of Austin's property was a disproportionate punishment for the sale of two grams of cocaine, thus constituting "cruel and unusual punishment," or an "excessive fine." Rather, the court "reluctantly" concluded that it did not matter whether the punishment was cruel, unusual and excessive. Austin was entitled to no relief, the court held, because civil forfeiture proceedings are exempt from the requirements of the Amendment. *United States v. One Parcel of Property*, 964 F.2d 814, 817 (8th Cir. 1992).

The court of appeals recognized that "the principle of proportionality is a deeply rooted concept in the common law as stated and described in *Solem v. Helm*, 463 U.S. 277, 284 (1983), and that as a modicum of fairness,

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[3] By contrast, under the federal sentencing guidelines, distribution of less than 25 grams of cocaine would be a level 12 offense; with a two-level reduction for acceptance of responsibility, the guideline sentence would be 6-12 months imprisonment, with eligibility for probation subject to conditions of confinement including house arrest. *See* Sentencing Guidelines §§2D1.1(c)(16), 3E1.1.

the principle of proportionality should be applied in civil actions that result in harsh penalties." 964 F.2d at 817. Nevertheless, it felt constrained by precedent to hold that a violation of this fundamental principle of fairness would not offend the Constitution if it occurred in a civil forfeiture proceeding, rather than in a criminal case.

SUMMARY OF ARGUMENT

The Cruel and Unusual Punishments and Excessive Fines Clauses of the Eighth Amendment apply to the infliction of punishment by government officials charged with enforcing the criminal laws. In any ordinary meaning of the term, the forfeiture of petitioner's home and business as a consequence of his violation of the criminal narcotics laws clearly operates as a punishment or fine. Petitioner has suffered a severe financial penalty that operates to impose retribution for his offense, to deter him and others from similar conduct in the future, and to incapacitate him from committing such crimes (as least by utilizing the same property) again. Undoubtedly, such forfeitures are experienced as punishment by those on whom they are inflicted.

Moreover, the narcotics forfeiture program is intended by Congress, and administered by the Department of Justice, for punitive purposes. The legislative history of recent congressional forfeiture provisions demonstrates that Congress thinks of civil and criminal forfeitures interchangeably, as penalties designed primarily to deter potential offenders, and to incapacitate offenders from future violations by stripping them of the instrumentalities of crime. Thus, such forfeitures should be considered punishment to which the Eighth Amendment applies by its plain terms.

The fact that the forfeiture in this case was imposed in a civil proceeding does not exempt it from the provisions of the Eighth Amendment. This Court's cases

make clear that "punishment" may be imposed in either a civil or a criminal proceeding, and that the test for whether a civil sanction is "punitive" or "remedial" is functional. *United States v. Halper*, 490 U.S. 435 (1989). Unlike cases involving corporal punishment of school children, *Ingraham v. Wright*, 430 U.S. 651 (1977), or the imposition of punitive damages in civil cases, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), narcotics forfeitures such as the one in this case involve the same purposes and the same danger of abuse of the government's prosecutorial power that motivated the framers to adopt the Eighth Amendment.

Nor is the Amendment inapplicable because the forfeiture in this case was *in rem*. This Court has long recognized that forfeiture proceedings, "though they may be civil in form, are in their nature criminal," *Boyd v. United States*, 116 U.S. 616, 634 (1886), and that *in rem* narcotics forfeitures in particular "foster[] the purposes served by the underlying criminal statutes, both by preventing further illicit use of the [property] and by imposing an economic penalty." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974). The historical distinction between *in personam* and *in rem* forfeitures is based primarily on the anachronistic fiction that the property itself is guilty of the offense. But "[t]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification." *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). Since the true purpose and effect of the narcotics forfeiture statute is primarily punitive, the form of the action cannot defeat the limitations on government power created by the Constitution.

Nothing in the precedents of this Court is inconsistent with holding the Eighth Amendment applicable to this case. Although the Court has upheld civil *in rem* forfeitures against a variety of constitutional attacks, *see,*

e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, it has never considered the application of the Eighth Amendment. Petitioner does not argue that such forfeitures are intrinsically unconstitutional, only that the extent of the permissible forfeiture must be proportionate to the seriousness of the offense and the blameworthiness of the offender.

This Court should hold that the court below erred in refusing even to consider the merits of petitioner's Eighth Amendment challenge, and remand the case to provide the court of appeals with an opportunity to consider that challenge now. The important constitutional question in this case is whether the Eighth Amendment applies in civil forfeiture proceedings. The proper application of the Eighth Amendment to the facts of this case turns on legal and factual inquiries that have never been addressed by the court below. This Court should adhere to its normal practice and decline to consider those particularized issues until they have been considered by the lower court in the first instance. *See, e.g., Yee v. City of Escondido*, __ U.S. __, 112 S.Ct. 1522, 1534 (1992).

ARGUMENT

I. THE CONSTITUTION DOES NOT PERMIT CRUEL AND UNUSUAL PUNISHMENTS TO BE INFLICTED, OR EXCESSIVE FINES TO BE IMPOSED, REGARDLESS OF THE LABEL APPLIED TO THE PROCEEDING IN WHICH THE PUNISHMENT IS IMPOSED

As this Court has recognized by granting *certiorari*, the decision of the court below presents a question of profound significance. The court did not hold that the forfeiture imposed on Austin was not constitutionally disproportionate to his offense, or even that proportionality was not properly a part of the inquiry mandated by the Eighth Amendment's prohibitions of "cruel and unusual

punishments" or "excessive fines." Rather, the court held that the entire question of the cruel or excessive character of the punishment inflicted on Austin was a matter of no concern to the Constitution, because the Eighth Amendment is altogether inapplicable to a proceeding labeled "civil forfeiture." The question before this Court is thus whether fundamental provisions of the Bill of Rights can be defeated by the simple expedient of labeling the punishment "civil" or "*in rem*."

A. Austin Was Punished By The Forfeiture In This Case

In any ordinary meaning of the term, the forfeiture of Austin's home and business as a result of his criminal activity was a "punishment" and a "fine." The primary dictionary definition of "punish" is "to impose a penalty on for a fault, offense, or violation," and a "punishment" is "a penalty inflicted on an offender through judicial procedure." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 955 (1985). A "fine" is "a sum imposed as punishment for an offense," or "a forfeiture or penalty paid to an injured party in a civil action." *Id.* at 464.

There is no question that this is precisely what happened to Austin. Forfeitures under 21 U.S.C. §881 all depend on a "violation" of the laws providing criminal punishment for possession and distribution of controlled substances. 21 U.S.C. §881(a)(1).[4] Austin's property was taken from him by the government in this action precisely because he violated the criminal laws against selling cocaine.

Just as there is no doubt that the imposition of forfeiture in this case is "experienced as a punishment by

[4] Each subsection of §881, specifically including those cited in the complaint in this case, either repeats this language or incorporates by reference another subsection that does.

[the person] upon whom it is imposed,"[5] there is no doubt that the narcotics forfeiture statute is specifically intended, in significant part, to impose punishment on drug dealers and on those who facilitate their operations. In enacting the Comprehensive Forfeiture Act of 1984,[6] which added criminal forfeiture provisions and expanded the scope of civil forfeiture under §881,[7] Congress specifically intended "to enhance the use of forfeiture . . . as *a law enforcement tool* in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking." S. Rep.No. 98-225, 98th Cong., 2d Sess. at 191, *reprinted in* 4 U.S. Code Cong. & Admin. News 3374 (1984)(emphasis added). Congress had "hoped that through the use of [then] current criminal and civil forfeiture provisions, forfeiture would become a powerful weapon in the fight against drug trafficking and racketeering," *Id.* at 3377, but expressed "disappointment" with the fact that "the Federal Government's record in taking the profit out of organized crime, especially drug trafficking, was far below Congress' expectations." *Id.*

The Senate Report makes clear that Congress made little or no distinction between the purposes of the criminal and civil forfeiture procedures. "Forfeiture" is referred to generally as "the mechanism" for "an attack on the economic aspects" of narcotics crimes, *id.* at 3374, and civil and criminal forfeiture proceedings are described in turn as alternative measures to accomplish the

[5] Note, "Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process," 45 U. Miami L.Rev. 911, 946 n.165 (1991).

[6] The Comprehensive Forfeiture Act constitutes Chapter III of the Comprehensive Crime Control Act of 1984, Pub. L.No. 98-473 (1984).

[7] One of the specific provisions that permits the forfeiture in this case, §881(a)(7)(authorizing forfeiture of real property), was added by the Comprehensive Forfeiture Act.

same goals. *Id.* at 3376-80. Indeed, the Report makes clear that the criminal forfeiture provisions of 21 U.S.C. §853, which are indisputably a portion of the punishment imposed for crime, were adopted specifically to provide an alternative means of accomplishing the same punitive purposes that Congress attributed to the civil narcotics forfeiture provisions. *Id.* at 3379-80. Backlogs in civil court calendars and the efficiency of consolidating forfeiture actions with their underlying criminal cases, particularly in multidistrict cases, were cited as reasons for permitting broader use of criminal forfeitures, despite the fact that, in other respects, "civil forfeiture has advantages over criminal forfeiture." *Id.* Indeed, the very provision that permits forfeiture of the Austin's real property, §881(a)(7), was added to the law specifically because "the prospect of the forfeiture of the property would [be] a powerful deterrent" to criminal activity -- the classic purpose of criminal punishment. *Id.* at 3378. This point was highlighted by Senator Biden, a principal supporter of the bill that became the Comprehensive Forfeiture Act, who emphasized that a primary purpose of forfeiture, whether civil or criminal, is "to punish [narcotics] defendants where it hurts the most -- their wallets." 128 Cong. Rec. 26577 (Sept. 30, 1982).[8]

As this Court has held, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment . . . ." *United States v. Halper*, 490 U.S. at 448 (emphasis added). The legislative history thus explodes any notion that civil forfeiture in narcotics cases is intended solely for purposes

[8] Another leading supporter of the Comprehensive Forfeiture Act, Representative Sawyer, speaking specifically about civil forfeiture, told the House of Representatives: "Recognition that the drug trade will not be affected unless the profit is removed from the crime has led to the development of forfeiture as a form of penalty." 130 Cong. Rec. 24,801 (Sept. 11, 1984).

radically distinct from those motivating punitive criminal sanctions.

Forfeiture of the property of drug dealers is a punishment. It is so understood by those who are its objects and by the federal prosecutors who administer it. It was so intended by the Congress that has created the modern civil forfeiture laws. Under any plain reading of the Eighth Amendment, it must therefore not be "cruel and unusual" nor, as a financial punishment or fine, "excessive." Accordingly, the government's effort to exclude forfeiture from the reach of the Amendment must rest on a claim that some unexpressed limitation on the reach of the Amendment somehow excludes civil forfeitures notwithstanding their punitive purpose and effect. As we demonstrate below, no such limitation exists.

B. The Eighth Amendment Is Not Inapplicable Simply Because A Forfeiture Is Imposed In A Civil Proceeding

This Court has never attached preclusive importance to the label attached to a particular form of action, correctly acknowledging that the applicability of a constitutional protection in a particular context depends on whether the language and purpose of the provision are implicated by the governmental action taken. "[T]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law." *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). In particular, the provisions of the Eighth Amendment are intended to curb governmental abuse of the power to punish, and that purpose is implicated where the government exercises that power, even if the exercise is cloaked in the form of sanctions labeled "civil" rather than "criminal."[9]

[9] Characterizing proceedings as "civil" or "criminal" for purposes of (continued...)

The Court recently applied this principle in *United States v. Halper*, 490 U.S. 435, when the Court addressed the constitutional protection against "multiple punishments for the same offense." *Id.* at 440. The question in that case was whether a "statutory penalty authorized by the civil False Claims Act . . . constitutes a second 'punishment' for the purpose of double jeopardy analysis." *Id.* at 441. In *Halper*, as here, the government argued that the constitutional provision at issue limited its protection to *criminal* punishments. The Court, however, emphasized that "[t]he notion of punishment, as we commonly understand it, cuts across the division between civil and criminal law . . . ." *Id.* at 447-48. Thus, "the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.* at 448.

Here, as in *Halper*, the question is whether the forfeiture of Austin's property, as applied to him, "serves the goals of punishment," rather than a remedial function. We have demonstrated above that it does. Accordingly, the fact that it has been applied in an action that is civil in form does not control the applicability of the Eighth Amendment. The forfeiture constituted punishment, and it may therefore not be cruel or unusual; as

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[9] (...continued)
those procedural provisions of the Bill of Rights that expressly or implicitly apply *only* in criminal proceedings is a difficult process. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The issue before the Court in this case is not whether civil forfeiture proceedings are "criminal" for purposes of these procedural provisions, but simply whether, even assuming the proceedings are properly denominated "civil" and conducted according to civil procedures and standards of proof, the result of the process constitutes a "punishment" subject to the standards of the Eighth Amendment.

a financial punishment it is a fine, and therefore may not be excessive.

In opposing the grant of *certiorari*, the government nevertheless relies on two cases in which this Court has rejected arguments that the Eighth Amendment applied in particular civil contexts. Op.Cert. at 4-5. In *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, the Court held that the Excessive Fines Clause did not apply to an award of punitive damages in a civil case between two private parties. And in *Ingraham v. Wright*, 430 U.S. 651, the Court concluded that the Cruel and Unusual Punishments Clause did not govern the administration of corporal punishment to public school students. Neither case, however, can fairly be read to make the application of fundamental rights turn on the label applied to a form of procedure, and both are factually distinguishable.

In *Ingraham*, the Court looked first to the language and history of the Eighth Amendment. Acknowledging that the language of the Amendment is not limited to criminal cases and, indeed, that a reference to "criminal cases" was actually omitted from an early draft of the English Bill of Rights of 1689 from which it derives, 430 U.S. at 664-65, the Court nevertheless emphasized that the three subjects with which the Amendment is concerned -- bail, fines and punishment -- are traditionally associated with the criminal justice process. The Court found this linkage suggestive that the Amendment was "intend[ed] to limit the power of those entrusted with the criminal-law function of government," and that the prohibition on cruel and unusual punishments was therefore "designed to protect those convicted of crimes." *Id.* at 664.

But the factual context of *Ingraham* belies any effort to read the case as drawing an absolute line based on procedural form. The Court's concern in *Ingraham* was to distinguish the punishment of criminals from the pun-

ishment of schoolchildren. The Bill of Rights is largely designed to protect unpopular minorities from possible excesses of the majority, and its many protections for criminal defendants reflect the wise concern that those accused or convicted of violations of society's fundamental rules are especially likely to be victimized by public revulsion for their acts. As the Court recognized in *Ingraham*, the Eighth Amendment in particular was rooted in the concern that zeal for the punishment of crimes not lead to legislative excess. 430 U.S. at 664-65.

In the majority's view, this core purpose of the Bill of Rights was not implicated in *Ingraham*. According to the Court, "[t]he schoolchild has little need for the protection of the Eighth Amendment," unlike someone accused of crime. *Id.* at 670.[10] The Court's emphasis on the link between the Amendment and criminal matters was thus functional, not formal. Indeed, the Court expressly recognized that its concern was not with labels: "Some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Id.* at 669 n.37; *see also Browning-Ferris*, 492 U.S. at 263 n.3.

No one could contend, however, that a person accused of sale of cocaine "has little need for the protection of the Eighth Amendment." Nor is it easy to imagine a form of action more "analogous to criminal punishments" than the civil forfeiture provided for violation of the narcotics laws, which were created and are maintained to further the purposes of the criminal laws. Indeed, the federal forfeiture program is administered by the very officials "entrusted with the criminal-law function of government" whose power the Court saw the Eighth Amendment as designed to limit. Thus, the con-

[10] *But cf. Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

cerns that led the *Ingraham* majority to classify corporal punishment of schoolchildren as outside the ambit of the Eighth Amendment are hardly relevant to civil narcotics forfeiture.

The same emphasis on substantive reality is reflected in *Browning-Ferris*. There, the Court considered whether punitive damages assessed by a jury in a civil antitrust action between two corporations implicated the Excessive Fines Clause. Once again, the Court's general formulations noted that the Amendment applies "primarily, and perhaps exclusively, to criminal prosecutions and punishments." 492 U.S. at 262. But the Court explicitly limited its ruling to the factual context before it. The Court expressly declined to "go so far as to hold that the Excessive Fines Clause applies just to criminal cases." *Id.* at 263. Moreover, the *Browning-Ferris* Court recalled that *Ingraham* had "left open . . . the possibility that the Cruel and Unusual Punishments Clause might find application in some civil cases," and pointed out that the Bail Clause of the Amendment was implicated "when there is a direct government restraint on personal liberty, be it in a criminal case or in a civil deportation proceeding." 492 U.S. at 263 n.3, citing *Carlson v. Landon*, 342 U.S. 524 (1952). Like *Ingraham*, *Browning-Ferris* thus serves clear notice that in stressing the Eighth Amendment's purpose to protect those who are subject to the government's criminal justice power, the Court is concerned not with labels but with substance.

The facts of *Browning-Ferris* are also far removed from this case. *Browning-Ferris* dealt with an award of punitive damages by a jury in a lawsuit brought by a private party. Both the language and the history of the Amendment point against its application to such damages. As the Court pointed out, "at the time of the drafting and ratification of the Amendment, the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." 492 U.S. at 265. More-

over, to the extent that the Amendment was "intend[ed] to limit the power of those entrusted with the criminal-law function of government," *Ingraham*, 430 U.S. at 664, the result in *Browning-Ferris* is a logical one. The framers of the Amendment feared "the potential for governmental abuse of its 'prosecutorial' power," *Browning-Ferris*, 492 U.S. at 266. Kelco Disposal, Inc. (the plaintiff in *Browning-Ferris*) does not wield that power.

By contrast, the present case plainly involves "a payment to a sovereign," and not to a private plaintiff. The language of the Amendment thus *favors* its application here. As all members of the Court acknowledged in *Browning-Ferris*, courts have long recognized that the word "fine" can apply to "money, recovered in a civil suit, which was paid to the government." *Id.* at 265 n.7, citing *Hanscomb v. Russell*, 77 Mass. 373, 375 (1858), and *Gosselink v. Campbell*, 4 Iowa 296 (1856). See also 492 U.S. at 295 (O'Connor, J., concurring in part and dissenting in part).

More importantly, this case differs from *Browning-Ferris*, as it does from *Ingraham*, in involving the exercise of punitive power not by private parties and jurors, but by the very prosecutorial powers that the Eighth Amendment was intended to control. The Court in *Browning-Ferris* was careful to limit its holding to cases brought by private parties. "Here the government of Vermont has not taken a positive step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." 492 U.S. at 275. By contrast, that is exactly what the government *has* done in this case.

C. The Eighth Amendment Is Not Inapplicable Because The Action Is Styled An *In Rem* Forfeiture

The government additionally argues that even if the Eighth Amendment applies in some civil contexts, it should not be held to apply to civil forfeitures because the purpose of such forfeitures is "remedial." Op.Cert. at 4. In fact, however, a consideration of the nature, purposes, and applications of the civil forfeiture statute at issue in this case compels the conclusion that proceedings under that statute are exactly the sort of punitive civil action to which the provisions of the Eighth Amendment ought to apply.

Far from being uniquely remedial, forfeitures are the closest to criminal punishments of all civil remedies. This Court long ago recognized that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." *Boyd v. United States*, 116 U.S. at 634. As recently as 1965, this Court cited *Boyd* with approval on this very point, noting that a forfeiture proceeding is at least "quasi-criminal in character." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965).

Like criminal actions, forfeiture proceedings are brought in the name of the state to enforce provisions of the criminal laws. Unlike punitive damages, or various civil fines provided for in various regulatory schemes, the narcotics forfeitures mandated by 21 U.S.C. §881 all require as a prerequisite the occurrence of a criminal "violation of this subchapter." 21 U.S.C. §881(a). As this Court has acknowledged, the forfeiture of property used "in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Calero-Toledo v. Pearson Yacht Leasing*

Co., 416 U.S. at 687.[11] As demonstrated above, the legislative history of the very forfeiture provision at issue in this case demonstrates that narcotics forfeitures under §881 were perceived by Congress as interchangeable with criminal *in personam* forfeiture and thus as a "powerful deterrent" to the commission of drug offenses -- in other words, as a punishment. S. Rep. 98-223 at 195, 4 U.S. Code Cong. & Admin. News at 3378.

Despite the many reasons for characterizing forfeitures under §881 as punishments that are limited by the Eighth Amendment, the government will no doubt rely on the historical distinction between *in personam* and *in rem* forfeitures. *In personam* forfeitures, such as those attendant on violations of the RICO statute, *see* 18 U.S.C. §1963, are explicitly designated as punishments for crime.[12] They are imposed on a defendant as part of a judgment in a criminal case, after guilt has been proved beyond a reasonable doubt, and they require the defendant, and only the defendant, to yield his or her interest in the disputed property.[13] *In rem* forfeitures, by

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[11] While emphasizing the use of forfeiture laws as an adjunct to criminal sanctions, the Court in *Calero-Toledo* relegated the ostensibly "remedial" purposes that forfeiture laws "also" serve -- "compensat[ing] the Government for its enforcement efforts and provid[ing] methods for obtaining security for subsequently imposed penalties and fines" -- to a footnote. *Id.* at 687-88 n.26.

[12] The government concedes that criminal *in personam* forfeitures, such as those imposed by RICO, 18 U.S.C. §1963, are limited by the Eighth Amendment. Op.Cert. at 6 n.1. *See also United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987).

[13] Such forfeitures have been rare in American law. From the abolition of forfeiture of estates by the first Congress in 1790, Act of April 30, 1790, 1 Stat. 117, until the adoption of RICO in 1970, 18 U.S.C. §1963, *in personam* forfeitures of this type were unknown to federal law. *See* Note, "The Forfeiture of Profits Under the Racketeer Influenced and Corrupt Organizations Act: Enabling Court's to Realize RICO's Potential," 33 Am.U.L.Rev. 747, 754 n.50 (1984).

contrast, are ostensibly civil actions against the property itself. *See The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827). They follow an action which is civil in form, rules of procedure and burden of proof, in which no defendant is specifically found guilty of a crime, and they extinguish the title of any person or entity other than the government to the property in question. *In rem* forfeitures are frequently said to be based on a legal fiction in which the property itself is held to be guilty of a crime. *Id.*[14]

Legal fiction, however, is not a sound basis for the application of constitutional principle.[15] It insults the framers, as well as contemporary values, to attribute to the Constitution the proposition that depriving an owner of his entire property as a result of his violation of the narcotics laws does not constitute punishment, because it is the property itself and not the owner who is treated as the guilty party under the relevant form of action.

Nor can it be claimed that the purpose of civil for-

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[14] This fiction is often traced back to the common law principle of deodands, which held an inanimate object involved in a fatal accident forfeit to the Crown, or even biblical injunctions requiring punishment of animals that caused the death of humans. *Exodus* 21:28-30. *See* Finkelstein, "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty," 46 Temp. L.Q. 169 (1973). *See also* Palm, "RICO Forfeiture and the Eighth Amendment: When is Everything Too Much," 53 U. Pitt. L.Rev. 1, 6-13 (1991).

[15] In the jurisdictional context, this Court has ruled that the ancient fictions upon which the distinction between *in personam* and *in rem* actions rest do not justify exempting actions *in rem* from the constitutional standards of fairness imposed on *in personam* actions. "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant." *Shaffer v. Heitner*, 433 U.S. at 212.

feitures is primarily or exclusively remedial, such that its punitive purposes and effects are somehow submerged in a scheme that provides "rough" remedial justice. *Cf. United States v. Halper*, 490 U.S. at 446. Unlike the "liquidated damages" penalty of the False Claims Act, narcotics civil forfeitures do not substitute for damage remedies, and compensate no victim of crime. Like other fines and punishments, they inure to the public treasury, where they are used for law enforcement purposes.[16]

This is not to say that civil forfeiture serves no remedial ends, and is purely criminal in nature. As this Court held in *Halper*, "[i]t is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." *Id* at 447. For example, forfeiture of contraband, or of the instrumentalities of crime, will often have the remedial purpose of removing dangerous items from circulation. Narcotics, weapons and burglar tools may be declared forfeit when they are used in the commission of a crime, not simply as a supplement to fines or imprisonment, but because such items are dangerous, at least in the hands of those who have abused them. Moreover, the punitive component of such forfeitures is minimal, given the relatively low legitimate value of such items.

The extension of this principle to more valuable

[16] The Comprehensive Forfeiture Act of 1984 provides that such forfeitures no longer become part of the general Treasury, but instead become part of a special Assets Forfeiture Fund within the Treasury, and permits the transfer of a portion of the value of forfeited assets to state and local law enforcement agencies. Pub. L.No. 98-473, §§309-310, codified at 21 U.S.C. §881(e)(1)(A) and 28 U.S.C. §524(c). The fact that the law enforcement agencies who enforce the criminal forfeiture laws obtain direct financial benefit from doing so enhances the very potential for abuse that the Eighth Amendment is designed to control. *See* below at note 20. *See also Harmelin v. Michigan*, _ U.S. __, 111 S.Ct. 2680, 2693 n.9 (1991)(opinion of Scalia, J.).

property, such as vehicles and boats, is more problematic, however, and its application to real estate stretches the remedial rationale to the breaking point. We do not really believe that someone who has transported narcotics in a vehicle or hidden them in a house or barn has rendered the property so dangerous that it must be surrendered to the government for the sake of public safety. Since the value of such property bears no reasonable or necessary relation to the seriousness of the offense, the notion that any remedial purpose is being served becomes more remote. It seems clear that the primary purpose of such laws, as this Court recognized in *Calero-Toledo*, is to "foster[] the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." 416 U.S. at 687.

To recognize that the remedial justification of *in rem* forfeitures is largely fictional, of course, does not render such statutes unconstitutional. Taking the vehicle of a drug dealer may be an entirely appropriate portion of a punishment that may also include imprisonment and other financial sanctions. But it is nevertheless a punishment, and therefore subject to the constitutional principles that limit the degree of punishment that may be imposed by a civilized society. Just as the imposition of life imprisonment for possession of a single marijuana cigarette would be cruel and arbitrary, *cf. Solem v. Helm*, 463 U.S. 277, so might a fine or forfeiture equal to a person's entire possessions be constitutionally excessive.

D. The Application Of The Eighth Amendment To Civil *In Rem* Forfeitures Is Not Inconsistent With This Court's Cases

It may be argued, finally, that a number of decisions of this Court rejecting various attacks on *in rem* forfeiture under a variety of statutes somehow foreclose the

issue presented in this case. If forfeiture may constitutionally be applied against an owner who is guilty of no offense at all, *see, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, it may be asked, how can the forfeiture of the property of an admitted offender violate the Constitution? Any such argument, however, would misperceive petitioner's claim in this case, the nature of this Court's forfeiture decisions, and the implications of this Court's prior decisions under the Eighth Amendment.

At a fundamental level, petitioner's argument cannot be foreclosed by any prior decision of the Court, since it presents a question of first impression. While the Court has dealt with a variety of constitutional and statutory issues arising under various forfeiture statutes, this Court has never considered whether any civil forfeiture violated the Cruel and Unusual Punishments or Excessive Fines Clause. Indeed, as discussed above, the Court has never addressed the substance of the Excessive Fines Clause at all. Holdings that particular applications of various forfeiture statutes do not violate other constitutional provisions have no bearing on that issue.

Moreover, petitioner does not argue that the Eighth Amendment prohibits civil *in rem* forfeitures, as applied to those guilty of crime or to those innocent of criminal wrongdoing. His argument is merely that any such forfeiture must be weighed against the nature of his offense. The Eighth Amendment does not prohibit punishment, only punishment that exceeds what a civilized society would regard as proportionate to the offense. That the Court has sustained forfeitures in the past -- without considering the Eighth Amendment at all -- does not preclude the possibility that some future punishment may be found to be excessive.

Nor can it be argued that the Court's long acceptance of the fictional nature of the civil *in rem* forfeiture, *see e.g., The Palmyra*, 25 U.S. at 14, somehow precludes

recognition of its punitive quality.[17] As early as *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510 (1921), the Court acknowledged the "formidable" argument that, in enacting a forfeiture statute, "Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner, who was without guilt" and that, if the statute was interpreted to apply to innocent owners, "it seems to violate that justice which should be the foundation of the due process of law required by the Constitution." Though the Court concluded that the long history of forfeiture law required rejection of that argument, it did not purport to decide, in that or any other case, that forfeitures were exempt from challenge under other constitutional provisions, that an *in rem* forfeiture could never be of a magnitude so disproportionate to the fault (or lack of fault) of an owner as to be constitutionally excessive, or that the Court must ignore in all contexts the punitive purposes and effects of particular forfeiture programs.

Calero-Toledo, in particular, does not stand in opposition to petitioner's argument. Like the earlier civil forfeiture decisions of this Court, it does not address the applicability of the Eighth Amendment. Nor does it pur-

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[17] Commentators have been caustic in noting the "anachronistic" nature of the personification fiction at the heart of the *in rem* forfeiture. The doctrine has been described as a "legal curiosity," "repugnant," a "perversion," and "superstitious." *See* Note, *supra* n.5, at 918-19 & nn.34-39 (collecting sources). Law review commentators have universally called for application of the Eighth Amendment to civil forfeitures under §881. *See, e.g.*, Note, "Extending Constitutional Protection to Civil Forfeitures that Exceed Rough Remedial Compensation," 60 Geo. Wash. L.Rev. 194 (1991); Note, "Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment," 89 Mich.L.Rev. 165 (1990); Note, "Fear and Loathing and the Forfeiture Laws," 75 Cornell L.Rev. 1151, 1175-78 (1990); Note, "Shouldn't the Punishment Fit the Crime," 55 Brooklyn L.Rev. 417 (1989).

port to find such forfeitures "remedial" -- on the contrary, it emphasizes that narcotics-related forfeiture statutes advance "the same purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." 416 U.S. at 687. Of course, these purposes -- incapacitation and deterrence by making crime unprofitable -- are two of the defining purposes of punishment.

Nor does *Calero-Toledo* accept some basis of strict liability that is incompatible with the idea of punishment. The apparently unjust imposition of sanctions on the yacht owners in *Calero-Toledo*, who were innocent of criminal intent, and perhaps even of negligence in the ordinary understanding, is not confined to some "remedial" civil procedure, but has been imposed in confessedly criminal contexts as well. *See, e.g., United States v. Dotterweich*, 320 U.S. 277 (1943). Whether the punishment is denominated civil, as in *Calero-Toledo*, or criminal, as in *Dotterweich*, the Court has recognized that the public welfare occasionally requires the imposition of sanctions on persons who lack criminal intent or moral blameworthiness. In such cases, the Court has allowed punishment on a strict liability basis, in effect putting the burden on those "in responsible relation" to property or an enterprise to prevent harm from its operation or use.[18]

But the Court's long acceptance, as a matter of statutory interpretation and against due process arguments, that property may be forfeited *in rem* even where a party with an interest in the property is not blameworthy, is

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[18] Significantly, however, *Calero-Toledo* does not permit the imposition of *in rem* forfeiture, any more than the criminal strict liability cases permit the imposition of criminal punishment, on those who had no ability to avoid the harm the law seeks to prevent. *See also United States v. 92 Buena Visa Avenue*, No. 91-781, __ U.S. __ (Feb. 24, 1993).

not in itself at odds with the Court's Eighth Amendment jurisprudence. Certainly, nothing in the Court's past decisions forecloses a holding in this case that excessive and disproportionate financial punishments violate the Eighth Amendment, whether imposed after a civil proceeding or after a criminal one.

II. THE CASE SHOULD BE REMANDED TO THE COURT OF APPEALS FOR A DETERMINATION WHETHER THE FORFEITURE IN THIS CASE CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT OR AN EXCESSIVE FINE

In opposing the grant of the writ of *certiorari*, the United States argued that the punishment imposed in this case would be surely upheld even if subjected to Eighth Amendment scrutiny. Citing *Harmelin v. Michigan*, 111 S.Ct. 2680, and the severe penalties made applicable to various drug offenses by the laws of the United States and the several states, the government contended that a financial exaction of $38,000 as a fine for the sale of a small quantity of cocaine could not be viewed as constitutionally disproportionate. Op.Cert. at 7-8. Whether or not the government is correct should be determined in the first instance by the court of appeals.

Because the court of appeals believed that the Eighth Amendment had no application to this case, it had no occasion to address the merits of Austin's claim that the Amendment had been violated. It is the ordinary practice of this Court not to address questions that have not first been addressed in the courts below. *See, e.g., Yee v. City of Escondido*, 112 S.Ct. at 1534; *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 552 n.3 (1990); *Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971).

That practice should be followed in this case. Although the government contends that the relatively modest dollar value of Austin's property makes this an easy case, the Eighth Amendment question here should not be resolved so casually. The determination involves legal questions that this Court has never addressed, on which full briefing and the careful attention of a lower court would be helpful. And the ultimate resolution of the issue must necessarily turn on the particular facts of this case, which the court of appeals has never weighed against an Eighth Amendment challenge.

The government essentially argues that since American statutes commonly permit punishment of offenses like Austin's by significant terms of imprisonment, and fines well in excess of the value of Austin's home and business, the punishment inflicted on Austin cannot have been constitutionally disproportionate. Indeed, this Court in *Harmelin* held that life imprisonment for the sale of 672 grams of cocaine -- an amount of a different order of magnitude than the two grams at issue in this case -- was not constitutionally disproportionate. How, then, the government asks, can a financial exaction of only $38,000 be cruel and unusual?

The short answer is that the instant case raises issues different from those in *Harmelin*. Because the sanction in this case is essentially financial, it implicates the Excessive Fines Clause of the Amendment. Unlike the Cruel and Unusual Punishments Clause, the requirements of the Excessive Fines Clause have been subjected to little or no analysis by this Court. Indeed, as the Court pointed out in *Browning-Ferris*, 492 U.S. 257, the Court had "*never* considered an application of the Excessive Fines Clause" before that case was decided. *Id.* at 263 (emphasis added). And because the Court decided that the Clause had no application to punitive damages, the Court had no occasion even there to consider the meaning and extent of the Clause where it does apply.

Nor is the meaning of the Clause necessarily congruent with the Cruel and Unusual Punishments Clause. Justice Scalia's argument that the latter Clause contains no proportionality requirement at all rests heavily on its specific wording, *Harmelin*, 111 S.Ct. at 2687, and on the specific history of the phrase "cruel and unusual" in prior English and American constitutional texts. *Id.* at 2686-96. Indeed, his linguistic argument against proportionality rests in part on the specific argument that these texts "did not explicitly prohibit 'disproportionate' or '*excessive*' punishments." *Id.* at 2687 (emphasis added). But the wording of the Excessive Fines Clause seems directly to address the issue of proportionality, since the word itself "suggests that a determination of excessiveness should be based at least in part on whether the fine imposed is disproportionate to the crime committed." *Id.* at 2709 (opinion of White, J.).[19]

Moreover, although a majority of the Court in *Harmelin* did not find that the Cruel and Unusual Punishments Clause invalidated the life prison sentence there because of its mandatory nature, it is by no means clear what role should be played in the proportionality inquiry under the Excessive Fines Clause by the special procedural aspects of civil forfeiture. In its death penalty jurisprudence, the Court has repeatedly found both excessive discretion and unmitigated mandatory sentencing to raise troubling Eighth Amendment problems. The

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[19] The Court's analysis of the Excessive Bail Clause, which uses the same word as part of the same sentence as the Excessive Fines Clause, seems to recognize that the word inevitably implies that bail is excessive when there is a lack of proportion between the amount of bail and the purposes for which the bail is set. *Stack v. Boyle*, 342 U.S. 1 (1951). As the Court held in *United States v. Salerno*, 481 U.S. 739, 754 (1987), "to determine whether the government's response [in setting conditions of release or detention] is excessive, we must compare that response against the interest the government seeks to protect by means of that response." In other words, "excessive" bail is that which is disproportionate.

death penalty cases also teach that the Eighth Amendment is not blind to requirements of sound procedure in the administration of severe penalties. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

This interplay between questions of proportionality and procedure should not be surprising. A constitutional provision that was "intend[ed] to limit the power of those entrusted with the criminal-law function of government," *Ingraham*, 430 U.S. at 664, and to address "the potential for governmental abuse of its 'prosecutorial' power," *Browning-Ferris*, 492 U.S. at 266, is hardly consistent with penalty schemes that sweep so broadly as to allow hardly any defense, apply mandatorily without mitigating factors or judicial discretion, and relegate applications for mercy entirely to the discretion not only of prosecutors, but of prosecutors with an institutional financial stake in the penalty at issue.[20] *Cf. Connally v. Georgia*, 429 U.S. 245 (1977)(invalidating system of search warrant applications to magistrate with financial stake in issuing warrants).

The forfeiture scheme at issue in this case has precisely these features. Their importance under the Excessive Fines Clause should not be addressed by this Court in the first instance without an opportunity for lower courts to develop the law. Contrary to the government's view, little purpose would be served by having this Court attempt to determine whether a particular forfeiture violates those standards, in the first instance, in a case of first impression, in an area in which the Court has been deeply divided.[21]

Finally, the financial exactions involved in this case differ in one other significant way from the punishments of death and imprisonment with which the Court's cases under the Cruel and Unusual Punishments Clause have dealt. While every person no doubt places a different value on his or her liberty, and indeed on life itself, the deprivation of life or liberty is sufficiently overpowering that a punishment of death or imprisonment for a substantial term of years can be evaluated for proportionality without reference to the specifics of the punishment's impact on the particular defendant involved. Whether death is a constitutionally disproportionate penalty for rape, *Coker v. Georgia*, 433 U.S. 584 (1977), or life imprisonment for a series of minor felonies, *Solem v. Helm*, 463 U.S. 277; *Rummel v. Estelle*, 445 U.S. 263 (1980), does not depend on any factor unique to the defendants in those cases.

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[20] As noted above, under the forfeiture scheme at issue here the forfeiture benefits not merely the Treasury generally but the very law enforcement authorities who decide when to seek forfeiture. *See* note 16 above, citing 21 U.S.C. §881(e)(1)(A) and 28 U.S.C. §524(c). The special potential for abuse inherent in financial sanctions was recognized even by those Justices who entirely rejected proportionality analysis in *Harmelin*: "There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue." 111 S.Ct. at 2693 n.9 (Scalia, J.). The revenue enhancing incentive of the forfeiture punishment is even more severe here, because the officials who decide whether to seek forfeiture have a more direct stake in funds that will benefit their agencies than in general government revenues.

[21] In *Harmelin*, the Court was unable to muster a majority for any single method of proportionality analysis, and the Court therefore remains unlikely to provide any useful guidance to the lower courts on that subject. Two Justices concluded that the Eighth Amendment does not require that penalties be proportioned to the seriousness of the offense. 111 S.Ct. at 2684-2701 (Scalia, J.). While seven members of the Court rejected this view, those Justices divided sharply over the proper approach. A plurality of four adhered to the three-factor test of *Solem*. 111 S.Ct. at 2714-19 (White, J.); *id.* at 2719 (Marshall, J.). The remaining three Justices, however, took a radically different approach to the role of two of those factors. *Id.* at 2705-07 (Kennedy, J.).

Financial penalties are crucially different. In the language of economists, money has a declining marginal utility. To a millionaire, a $38,000 fine may well be a modest imposition, hardly to be compared with even a short term of imprisonment; to petitioner in this case, it represents a loss of his home and his livelihood -- perhaps, indeed, of his entire property in the world.[22] In recognition of that fact, sentencing schemes typically require judges imposing financial penalties to consider the wealth of the defendant before determining the amount of the fine.[23]

The government's suggestion that this is an easy case rests on the abstract calculation that, if a substantial jail term is not disproportionate for the offense, a financial penalty of less than $40,000 can hardly be unconstitutional. But if the magnitude and hence the potential excessiveness of a fine is to be measured not in absolute terms, but relative to the wealth of the offender, the question appears in a different light. Is the confiscation of a person's entire estate a proportionate punishment for the sale of two grams of cocaine? The framers who outlawed the traditional penalty of "corruption of

[22] From the fact that petitioner has been allowed to proceed *in forma pauperis*, it is evident that his resources are meager. The courts below had no occasion to make findings on the proportion of his entire assets that the forfeiture represented, but the record permits the inference that the forfeiture confiscated all or nearly all that he owned.

[23] For example, a court imposing a fine is required to consider, in addition to the usual factors relevant to sentencing, "the defendant's income, earning capacity, and financial resources," 18 U.S.C. §3572 (a)(1), and "the burden that the fine will impose on the defendant and [his dependents]." 18 U.S.C. §3572(a)(2). *See also* Sentencing Guidelines §5E1.2(d)(requiring courts to consider similar factors).

blood,"[24] and rejected forfeiture of estates at about the same time that the Eighth Amendment was drafted[25] presumably would not have thought so.

The Eighth Circuit in this case had no occasion to address the merits of petitioner's claim that the forfeiture in this case was disproportionate and excessive because, in its view, the relevant Clauses of the Eighth Amendment were simply inapplicable. Once this Court has held, as it should, that the Amendment does apply, it will have answered the significant question, and settled the conflict among the circuits, that justified review by this Court. No purpose would be served by addressing abstract issues regarding the meaning of those Clauses, or the particulars of petitioner's own case. The prudent and proper course is to remand to the court below for a determination whether the forfeiture here was consistent with the applicable Clauses of the Eighth Amendment.

[24] *See* Art. III, §3, cl.2. The penalty of corruption of blood divested convicted felons of all property and rights of station.

[25] Act of April 30, 1790, ch. 9, §24, 1 Stat. 117 (1790).

CONCLUSION

For the reasons stated above, the judgment below should be reversed and the case remanded to the court of appeals.

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Dated: March 1, 1993

No. 92-6073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RICHARD LYLE AUSTIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF ARIZONA AND CALIFORNIA, IN SUPPORT OF RESPONDENT

Joined by the States of Arkansas, Connecticut, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, Washington, Wyoming, and Territory of Virgin Islands.

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QUESTIONS PRESENTED

I. Whether the concept of proportionality arising from the eighth amendment to the United States Constitution should be applied to the forfeiture of property under 21 U.S.C. § 881(a)(4) and (a)(7)?

II. Whether, when a showing is made that the forfeiture is excessive, the government must show that the forfeiture is not so grossly disproportionate to the offense as to violate the cruel and unusual punishments and excessive fines clauses of the eighth amendment?

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INTEREST OF AMICI CURIAE

Virtually every state legislature has enacted civil in rem forfeiture statutes that provide for the forfeiture of the instrumentalities of drug offenses. This remedial tool is used as an effective economic measure to protect the public from the consequences of illicit drug activity which is the subject of the federal statute at issue in this case.

Costs arising from drug use are enormous and fall most heavily on the States. Direct medical costs are substantial. The costs of treating children born to mothers who used cocaine while pregnant is one illustration. A 12 city survey found that 72 public and private hospitals are caring for more than 7,000 "boarder babies" a year at an annual cost of $34 million.[1/]

The accelerant effect of drug use on the AIDS epidemic is another illustration. In New York City officials estimate that at least half of the intravenous drug users are HIV positive, and that 61 percent of the city's female AIDS cases and 37 percent of the male cases stem from using infected needles. The lifetime cost of treating an AIDS patient in the United States is now $102,000.[2/]

Prevention of drug abuse through education, family counseling, early family intervention and follow-up of identified drug abuse risks through diversion, enforcement, probation and parole are consuming ever larger sums of public funding at state and local levels. In the period from fiscal year 1982 through 1992, the annual federal drug control budget soared from $1.605 billion dollars to $11.655 billion dollars, more than a seven-fold increase.[3/]

Direct social expenditures on drug users is only a small part of the overall cost of drug abuse. Vast public and private

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1. New York Times, July 26, 1992 at A16. Another $150 million per year is spend on special education for the "survivors."

2. New York Times, July 23, 1992, at B8.

3. U.S. Department of Justice, Sourcebook of Criminal Justice Statistics, 1990 at 626-628 [hereafter cites as Sourcebook].

losses are masked, including reduced productivity, inflated health care and health care insurance costs, work-related and non-work-related accidents, including automobile accidents, and artificial inflation and distortion in markets affected by drug money laundering activity.

The profits reaped from the distribution of illicit drugs have more insidious social costs. Illegally derived money distorts the legitimate economy. According to the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"), the fishing industry in Washington state[4] and the diamond district in New York[5] are at risk from money laundering. The same is reportedly true for the wholesale jewelry industry in Los Angeles.[6] Dirty money assertedly played a role in the savings and loan crisis as well.[7]

The illicit drug industry has emerged in the waning years of the twentieth century as one of most significant economic threats to democratic society world wide. International accords are now required to address the threat, and nations, including the United States, have pressed military forces into drug interdiction. These costs are created in the pursuit of illicit profit, and therefore call for economic remedies.

Drug profits being what they are, for every low-level dealer arrested and imprisoned, there are many eager to take his place. Between 1981 and 1989, prison commitments for drug offenses increased 600 percent.[8] Drug-related arrests in

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4. FinCEN, Money Laundering Threat Assessment for Washington State, at 80-81.

5. FinCEN, Money Laundering Threat Assessment for New York City Metropolitan Area, at 12.

6. Los Angeles Times, August 22, 1991, at B1.

7. Wall Street Journal, April 18, 1991, at B6(E).

8. See, Civil Remedies In Drug Enforcement Report (August/September 1991) at 14, citing Studies by the Bureau of Justice Statistics, U.S. Department of Justice.

cities over 100,000 population rose by an average of 250% between 1980 and 1989 for sales and distribution offenses. By the end of 1991, state prisons were operating at nearly one-third above capacity and federal prisons were 46 percent above capacity.[9]

The U.S. General Accounting Office concluded that drug prosecutions have "greatly increased the burden on already strained courts, correctional facilities, probation and parole offices, and substance abuse centers."[10] The rate of sentenced prisoners in state and federal institutions per 100,000 resident population remained relatively constant in modern U.S. history from 1930 to 1975 at around 100-120. Between 1975 and 1989 it grew rapidly to more than double that, to about 270 per 100,000 resident population in 1989.[11]

These costs are largely borne by state and local government. Civil, in rem forfeiture is a critical economic remedy applied to a profit-motivated drug industry. Amici have a compelling interest in the outcome of this case. Should the Court conclude that the eighth amendment constrains civil instrumentality forfeitures, the implementation of federal and state forfeiture statutes will be seriously impaired. There is little doubt that the eighth amendment prohibitions against either cruel and unusual punishments or excessive fines as construed in this case would apply to the states. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 284

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9. See, Civil Remedies In Drug Enforcement Report (August/September 1991) at 14, citing studies by the Bureau of Justice Statistics, U.S. Department of Justice.

10. See, "The War on Drugs: Arrests Burdening Local Criminal Justice Systems" (General Accounting Office, April 1991).

11. Sourcebook, at 603. These figures suggest a far more substantial social cost of drug dealing. The "freedom cost" is a cost suffered by a society in direct proportion to its incarceration rate. It would be a bitter irony if a constitutional provision designed to control this cost were interpreted to disable a non-incarceration strategy, forcing even greater reliance on incarceration and raising the freedom cost of social control.

(1989) (and cases cited therein) (O'Connor, J. concurring and dissenting).

SUMMARY OF ARGUMENT

The eighth amendment prohibition against cruel and unusual punishments does not constrain civil instrumentality forfeiture because such forfeitures are not "punishment" within contemplation of the amendment. "Punishment" has been construed as a punitive, corporal sanction only. See, Harmelin v. Michigan, 111 S.Ct. 2680 (1991). Forfeiture is remedial, not punitive, see United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), and affects property, not the person.

A civil instrumentality forfeiture does not constitute a "fine" for purposes of the eighth amendment. Fines evolved from pre-Magna Carta amercements which developed wholly apart from both forfeiture of estate and in rem forfeiture. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989). There is nothing to suggest that in adopting the eighth amendment the Congress intended it to apply to in rem forfeitures. Fines are punitive sanctions which enrich the government, while forfeitures are remedial and serve to prevent unlawful conduct and compensate for loss suffered by the government.

Civil instrumentality forfeitures are constrained only by the requirement that the forfeiture bear a rational relationship to the purposes of regulating, suppressing and remedying illegal conduct. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). Forfeitures under section 881 of Title 21 of conveyances and real property used to facilitate narcotics offenses are a reasonable response to the highly capitalized network which brings illegal drugs to the ultimate consumer by removing the network's assets, providing a disincentive to such conduct, imposing an economic sanction, and financing government anti-crime efforts. Proportionality analysis of a

civil instrumentality forfeiture is unnecessary and inappropriate to the remedial purpose of these statutes.

I.
THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS IS INAPPLICABLE TO CIVIL INSTRUMENTALITY FORFEITURE

The prohibitions of the eighth amendment are traceable to Magna Carta. Atrocious and barbaric injuries were inflicted on colonial subjects during the English reign. Harmelin v. Michigan, 111 S.Ct. 2680, 2687-8 (1991). The First Congress enacted the eighth amendment to outlaw particular modes of punishment. Harmelin, at 2694.

The prohibition against "cruel and unusual punishments" has been applied only in circumstances where the punishment is directed to the physical body, and not the property, of a person. It has been applied in capital cases, Payne v. Tennessee, 111 S.Ct. 2597 (1991); Enmund v. Florida, 458 U.S. 782 (1982); severity of prison sentences, Harmelin v. Michigan, 111 S.Ct. 2680; Robinson v. California, 370 U.S. 660 (1962); and conditions of confinement, Hudson v. McMillian, 112 S.Ct. 995 (1992); Wilson v. Seiter, 111 S.Ct. 2321 (1991). Historically the prohibition against cruel and unusual punishments has been employed to protect the physical body from abuse. It has not been employed or construed to address property rights.

Instrumentality forfeiture[12] is an ancient practice by which property used to commit or facilitate a crime or violation of a statute may be declared forfeited to the government. The property itself is considered to be the offending thing and the in rem proceeding through which the forfeiture is accomplished

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12. "Instrumentality forfeiture" refers generally to forfeitures caused by the use of an object to commit or facilitate a crime or other conduct giving rise to forfeiture. See, e.g., 21 U.S.C. § 881(a)(4)(7).

stands independent of and wholly unaffected by any criminal proceeding. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681-686 (1974), The Palmyra, 25 U.S. ___ (12 Wheat.) 1, 14-15 (1827). The rationale sustaining in rem forfeiture is that the thing itself is the offender and the ". . . only adequate means of suppressing the offense or wrong or insuring an indemnity to the injured party . . ." is to forfeit the thing without regard to the owner's conduct. Calero-Toledo, 416 U.S. at 684.

In Calero-Toledo, at 680-683, Justice Brennan, writing for the Court, traced the origins of civil instrumentality forfeiture to the English institution of the deodand, which was itself derived from Biblical, pre-Judeo-Christian, Greek and Roman practices. Citing Oliver Wendell Holmes's The Common Law, 5 (1881), Justice Brennan described how the deodand institution had been adapted to serve more contemporary functions of deterrence and enforcement. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 681-682, n. 19.

As this Court more recently observed,

> *Laws providing for the official seizure and forfeiture of tangible property used in criminal activity played an important role in the history of our country. Colonial courts regularly exercised jurisdiction to enforce English and local statutes authorizing the seizure of ships and goods used in violation of customs and revenue laws. . . .*
>
> *The first Congress enacted legislation authorizing the seizure and forfeiture of ships and cargos involved in customs offenses. . . .*
>
> *Later statutes involved the seizure and forfeiture of distilleries and other property used to defraud the United States of tax revenues from the sale of alcoholic beverages. . . .*

> *In all of these early cases the government's right to take possession of property stemmed from the misuse of the property itself.*

United States v. 92 Buena Vista Avenue, Rumson, ___ U.S. ___, 61 U.S.L.W. 4188, 4191 (1993).

Despite the long and storied history of civil instrumentality forfeiture and the modern adaptation of this remedy to ever more complex remedial purposes, the essence of civil instrumentality forfeiture continues to reside in its simple recognition that the use of property is necessary to the continuation of illegal conduct which thereby justifies the forfeiture of the property to the government. See, In re Various Items of Personal Property, 282 U.S. 577, 581 (1931); J.W. Goldsmith, Jr. - Grant Company v. United States, 254 U.S. 505, 513 (1921); United States v. All Funds, et al., 801 F.Supp. 984, 990 (E.D.N.Y. 1992) (currency as the "offending object").

The question presented is whether a remedial, civil forfeiture pursuant to 21 U.S.C. § 881(a)(4)(7), is constrained by the eighth amendment prohibition against cruel and unusual punishments. In determining whether a statutory remedy is constrained by the eighth amendment, it is first necessary to determine if the statute is remedial or punitive. The resolution whether a particular statute is remedial or punitive requires a two-step analysis.[13]

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13. Whether a statute is remedial or punitive has been analyzed under both the double jeopardy provision of the fifth amendment, United States v. Halper, 490 U.S. 435 (1989), and the eighth amendment prohibition against cruel and unusual punishments and excessive fines, United States v. One 107.9 A. Parcel of Land in Warren TP., 898 F.2d 396 (3rd Cir. 1990), United States v. Santoro, 866 F.2d 1538 (4th Cir. 1989). To the extent the analysis whether a statute is remedial or punitive is assisted by evaluating cases under either the fifth or eighth amendments, they are discussed. However the criteria delineating "punishment" under the fifth and eighth amendments are not necessarily interchangeable, as discussed at II, infra.

Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. See One Lot Emerald Cut Stones v. United States, [409 U.S.] at 236-237. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

United States v. Ward, 448 U.S. 242, 248 (1980).

Congress intended that 21 U.S.C. § 881(a)(7) be a civil remedy. It appears in Part E, Administrative and Enforcement Provisions of the subchapter, not in Part D, Offenses and Penalties. The civil proceedings of the customs laws for in rem proceedings apply, as well as the use of the rules of civil admiralty. 21 U.S.C. § 881(b), (d) (1988). By creating distinctly civil proceedings for such forfeitures Congress has indicated a civil not criminal sanction. United States v. One 107.9 A. Parcel of Land in Warren TP., 898 F.2d 396. Congressional intent is "clearly demonstrated by the procedural mechanisms it established for enforcing forfeitures under the statute." United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984).

As to the second step, only the clearest proof will suffice to support a finding a statute is so punitive in purpose and effect so as to negate a civil objective. United States v. One Assortment of 89 Firearms, 465 U.S. at 365; United States v. Ward, 448 U.S. at 249; United States v. One 107.9 A. Parcel of Land in Warren TP., 898 F.2d at 400. Circuit courts applying this analysis to forfeiture have consistently found a remedial purpose and effect. The Fourth Circuit, for example, has found that 21 U.S.C. § 881(a)(7) has broad

remedial purposes which include removing the incentive to engage in the drug trade by denying drug dealers the proceeds of illgotten gains, stripping the drug trade of its instrumentalities and financing government programs designed to eliminate drug trafficking. United States v. Santoro, 866 F.2d at 1544. Acknowledging that any forfeiture has a deterrent effect, the circuit court held that the effects of 21 U.S.C. § 881(a)(7) were civil and not sufficiently punitive to override the clear congressional intent that it be a civil provision.[14]

As explained by the Fourth Circuit, the removal of an instrument of the offense is not primarily an act of punishment, but rather an act which protects the community from the threat of continued drug dealing. United States v. Cullen, 979 F.2d 992, 995 (4th Cir. 1992). Because the chief purpose of instrumentality forfeiture is to remove the public danger posed by the instrumentality in the hands of the offender, considerations relating to punishment are irrelevant.

"In [instrumentality] forfeitures, there is no necessary relation between the value of the property forfeited and the loss to the government, nor is there any necessary proportion between the value of the property forfeited and the criminal use of the property." United States v. McCaslin, 959 F.2d 786, 788 (9th Cir.), cert. denied, 113 S.Ct. 382 (1992).

This Court has explained the factors to be considered in determining whether an action is punitive. Justice Kennedy, in

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14. The Fourth Circuit acknowledged that any deterrent and therefore punitive effect was clearly ancillary to the provisions's remedial, non-punitive purposes. United States v. Santoro, 866 F.2d at 1543, n. 3. Indeed, this Court has recognized that a purely civil forfeiture provision will have certain deterrent effects. Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. at 686.

This Court has also counseled that such determination is not to be made from the defendant's perspective because even remedial sanctions can carry the sting of punishment. United States v. Halper, 490 U.S. at 447, n. 7. Forfeiture actions may have the collateral effect of deterrence but "[t]his fact alone will not render a particular forfeiture punitive in nature." United States v. Certain Real Property . . . 38 Whalers Cove Drive, 954 F.2d 29, 36 (2nd Cir. 1992) (hereafter cited as United States v. 38 Whalers Cove Drive).

his concurring opinion in Harmelin v. Michigan, 111 S.Ct. at 2704, listed the goals of punishment to be retribution, deterrence, incapacitation and rehabilitation. These goals are the points of contrast between criminal and civil actions, as measured by the factors which were recently referred to by Justice O'Conner in the context of a civil action, as being useful in determining whether a sanction is penal:

> *(1) whether it involves an affirmative disability; (2) whether it has historically been regarded as punishment; (3) whether it comes into play on a finding of scienter; (4) whether its operation will promote retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether there is an alternative purpose for it; and (7) whether it is excessive in relation to the alternative purpose assigned.*

Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 298, citing to Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

Addressing each factor in turn, forfeiture does not involve the affirmative restraint of the person, such as loss of citizenship, imprisonment or death.

Second, civil forfeiture has not historically been regarded as punishment. As early as 1827, the Supreme Court found that forfeiture occurs independent of any criminal action. The Palmyra, 25 U.S. (12 Wheat.) at 15. More recently, the Court has held that neither double jeopardy nor collateral estoppel precludes civil, in rem forfeiture after an individual has been acquitted in a criminal case. United States v. One Assortment of 89 Firearms, 465 U.S. 354. An individual's innocence does not prohibit forfeiture of his property. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 686. Additional protections required in criminal cases have not been imposed in civil forfeiture cases.

In 1796, in United States v. LaVengeance, 3 U.S. (3 Dallas) 297 (1796), the Court held that a jury was not required in in rem actions. See, also, Van Oster v. Kansas, 272 U.S. 465 (1926) (jury not required in state forfeiture action); United States v. Zucker, 161 U.S. 475 (1896) (deposition of witnesses who were not present at trial should have been admitted despite objection); Clifton v. United States, 45 U.S. 242 (1846) (government may comment on forfeiture claimant's failure to produce evidence and on failure to explain circumstances).

Third, there is no requirement of scienter to impose forfeiture. Innocence of the owner has never been a defense to civil forfeiture because the action is against the offending property. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 686. It is the use of the property which prompts the forfeiture, not the actions of the owner or interest holder. A person need not be criminally liable as a condition to the civil forfeiture of his property. United States v. McCaslin, 959 F.2d 786; United States v. 141st Street Corp., 911 F.2d 870 (2nd Cir. 1990). The fact that the statute "makes no attempt to tailor the amount of loss suffered by forfeiting to the degree of culpability, [is] a strong indication that any punitive effect is incidental." United States v. $2,500 in U.S. Currency, 689 F.2d 10, 14 (2nd. Cir. 1982).

Fourth, civil asset forfeiture is not designed to serve as retribution or deterrence. The courts have recognized that protection from the harm of an instrumentality in the hands of the wrongdoer is not the only remedial purpose of forfeiture. The forfeiture law also serves other remedial purposes such as enforcing a duty of care that property not be used in the drug trade and financing the government's law enforcement effort.

Congress enacted 21 U.S.C. § 881(a)(7) to attack drug trafficking by removing real property assets which facilitate the drug activity. United States v. 141st Street Corp., 911 F.2d at 880. The economic power of the drug industry is negated when its resources and instrumentalities are forfeited. United States v. 38 Whalers Cove Drive, 954 F.2d at 36.

Forfeiture is additionally justified as a way of compensating the government for damages caused by drug offenses. State and local governments shoulder the bulk of not only the law enforcement costs, but also the costs of treating, educating and rehabilitating the casualties and potential victims of the illicit drug industry. This Court in Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 629 (1989), recognized that there is a strong governmental interest in obtaining full recovery of all forfeitable assets because such funds support law enforcement efforts.

It is impossible to determine with any certainty how much the government will spend on treating crack babies, drug addicts or medical injuries caused by the use of drugs, or how much the economy suffers as a result of drug activity in terms of lost work productivity, market errors and anomalies based on falsely reported land and stock values, unfair competition, and the diversion of legitimate goods and service provided from legitimate commerce to illicit commerce as described in Interest of Amici Curiae, supra. The proceeds of forfeited assets can be applied as compensation for the economic damages suffered by the government. Such recovery is similar to the concept of liquidated damages which has consistently been upheld. In One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 237 (1972), this Court upheld the customs forfeiture because it provided a reasonable form of liquidated damages for violation of the inspection provisions and served to reimburse the government for investigative and enforcement costs.

Because a civil penalty is remedial when it reimburses the government for costs, a civil forfeiture is similarly remedial because it acts to reimburse for many of the same costs.[13/] *This*

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15. One useful way of illustrating the compensatory, non-punitive nature of civil in rem forfeiture is to approach the problem through traditional tort analysis.

The four building blocks of a tort remedy are:

1) A duty, meaning an obligation recognized by the law, requiring people to conform to a certain standard of conduct, for the protection of others.

2) A failure to conform to the standard required.

3) A reasonably close causal connection between the conduct and some harm to others, commonly called "proximate cause" or "legal cause."

4) Damages to the interests of another, which includes damages to the public in general.

The analysis will follow Professor Prosser, the noted authority on tort law. Prosser and Wade, Cases and Materials on Torts (fifth ed. 1977).

First, instrumentality forefiture enforces a duty of care that property not be put to an illegal use.

Making use, of standard tort concepts, instrumentality forfeiture could be seen as the tort of "negligent empowerment of unlawful activity," the tort of providing property that somehow helps to empower the damaging conduct.

The causal connection between drug trafficking and the enormous social costs flowing therefrom are well recognized.

Finally, forfeiture imposes a form of strict liability on those who engage in or facilitate a highly dangerous, covert industry and provides a form of liquidated damages when exact damages are difficult to fix.

position was acknowledged by the Second Circuit: "The government may also use forfeitures to compensate the government's investigation and enforcement expenditures, in addition to any damages the government may suffer directly as a result of criminal acts, essentially as a form of 'liquidated damages' for harm caused by an individual wrong-doer." United States v. 38 Whalers Cove Drive, 954 F.2d at 36.

Fifth, while property subject to forfeiture under this statute must be used in a manner that facilitates a violation of law, the owner need not be culpable of criminal activity. The issue in a civil forfeiture proceeding is the use of the property, not the guilt of the person. No stigma attaches to the proceeding; in fact, many claimants are financial institutions and others of unquestioned integrity. The purpose of in rem forfeiture is not to punish the owner, but rather to remove the harm of the instrumentality.

Sixth, the purpose of the forfeiture statutes is not to punish, but to deter further illegal conduct and to remedy the damage done by the illegal conduct. Punishment of an

individual simply has no place in the application of the statute.[16]

The fact that these forfeitures are remedial in nature is illustrated in United States v. $2,500 In U.S. Currency, 689 F.2d 10, 13 (2nd Cir. 1982). In that case, the circuit court examined legislation relating to the forfeiture of drug-related materials, and found that, "[T]he addition of monies to the list of plants, raw materials, vehicles, and records used in drug traffic apparently reflects an indisputable legislative finding that money in the narcotics trade finances and assists future trade at least as much as vehicles and containers and a decision that they should likewise be seized in the effort to impede such traffic."

Finally, forfeiture is not excessive in relation to its goals. Exact damages and individual apportionment thereof is impossible. However, the forfeiture is limited to the instrumentality itself. It comprehends both under-assessments and over-assessments. If a dealer uses his car as an instrumentality to sell a drug which results in injuries the civil sanction of forfeiture falls far short of compensating for the harm proximately caused.

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16. Criminal punishment is based on a model of criminal conduct unrelated to large ongoing financially motivated networks. Infra, part III.

Criminal remedies simply break down when confronted with an ongoing racket, whether it is an international cocaine cartel, an inner-city crack cocaine distribution enterprise, or a small dealer, his sources and customers in South Dakota. First, there are many people whose conduct is part of the continuing operation of the enterprise. Second, the moral content of their conduct is not easily categorized as right or wrong, because participants play many roles which occur in many shades of gray. Third, the importance of their respective contributions to the success of the enterprise varies from essential to expendable. Incarceration tends to fall most heavily on people in roles that are visible but not strategically significant. For example, the drug "mules" who transport narcotics are far more susceptible to detection and arrest than are sophisticated money launderers. Fourth, the economic incentive often overcomes the perceived risk of incarceration. Fifth, punishment of any single participant or even a long succession of low-level participants does not stop or even seriously impair the conduct of the network. Sixth, the victims of criminal profiteering are sometimes not visible or direct, and social costs are spread among many. Many of the victims are participants, but the law-abiding populace pay the social costs.

Instrumentality forfeiture is remedial, so the "punishments" prohibition of the eighth amendment is not implicated.[17]

II. CIVIL INSTRUMENTALITY FORFEITURES ARE NOT FINES UNDER THE EIGHTH AMENDMENT

Whatever else defines a fine, a fine must be a punishment to be implicated in the eighth amendment. The modern day fine has its roots in common law amercements. Solem v. Helm, 463 U.S. 277 (1983). Amercements were the most common criminal sanction in 13th Century England. Id., at 290, n. 8. Amercements emerged after the Norman Conquest in 1066 at a time in English history before there was a distinction between criminal and tort law. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 287. Amercements were punishments meted out by the king. Amercements were originally set by the king and later were assessed by the court. Due to the potential for abuse of amercements, excessive amercements were prohibited by Magna Carta. Solem v. Helm, 463 U.S. at 290.

Fines originated in the 13th Century as a voluntary sum paid to the crown to avoid prison. The fine was a substitute for imprisonment. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 287-288. Fines and amercements

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17. Petitioner has cited United States v. Halper, 490 U.S. 435, in support of the proposition that the eighth amendment is applicable to civil forfeiture. Brief for Petitioner, at 28. Halper did not involve an analysis of punishment for purposes of the eighth amendment but rather of what constitutes punishment for purposes of the double jeopardy clause of the fifth amendment. Halper does not suggest a proportionality test. Halper only prevents a person from being punished twice in violation of double jeopardy. Halper does not limit the civil sanction nor does it provide guidance on the permissible extent of the total sanctions that may be imposed in a single action.

had very similar functions as both were revenue to the crown. Eventually fines were made mandatory, at which point the distinction between fines and amercements disappeared. Ibid.

By the 17th Century fines had lost their original character of bargain and had replaced amercements as the preferred penal sanction. The word "amercement" dropped out of ordinary usage. It was in the 17th Century that the word "fine" took on its modern meaning. Ibid. A fine is a punishment ". . . imposed in a measure out of accord with the penal goals of retribution and deterrence." Harmelin v. Michigan, 111 S.Ct. at 2693, n. 9. Fines were assessed in criminal cases and were a payment to a sovereign as punishment for some offenses. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 267.

Common law recognized two distinct forms of forfeiture during the period in which fines evolved from amercements: forfeiture of estate, assessed after conviction of a felony in personam, and instrumentality forfeiture, resulting from an action in rem. The differences between the two were substantial and significant. Justice Story explained common law forfeiture in The Palmyra, 25 U.S. (12 Wheat.) at 12:

> *It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or at least a consequence, of the judgment or conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offense; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common*

> *law, the offender's right was not devested until the conviction.*

In personam forfeiture was punitive in that the convicted ". . . felon forfeited his chattels to the crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the crown . . . . The basis for these forfeitures was that a breach of the criminal law was an offense to the king's peace, which was felt to justify denial of the right to own property." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 682.[18]

In personam forfeiture of estate contrasts sharply with in rem forfeiture. As explained by Justice Story:

> *But this doctrine [in personam forfeiture] never was applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing;*

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18. Common law in personam forfeiture of estate is radically different from modern in personam forfeiture pursuant to 21 U.S.C. § 853 (drug racketeering forfeiture) and 18 U.S.C. § 1963 (RICO forfeiture). Unlike common law forfeiture of estate, where a defendant lost his estate, the defendant in modern in personam forfeitures forfeits only those property interests which are connected to the underlying offense. The racketeering provisions were enacted as a new and different approach to reach the economic base and power of criminal activity. This Court has interpreted the forfeiture provisions liberally to effectuate their remedial purposes. Russello v. United States, 464 U.S. 16 (1983); United States v. Turkette, 452 U.S. 576, 589 (1981).

The statutes themselves provide that the forfeiture provisions shall be liberally construed to effectuate their remedial purposes. 21 U.S.C. § 853(o) (Supp. III 1985), Section 904 of Title IX Pub. L. 91-452, 84 Stat. 922, 947 (1970). The forfeitures pursuant to RICO are part of the criminal sentence but are no more punishment than restitution assessed in a criminal case. The same remedial purposes underlying the civil forfeiture provisions in 21 U.S.C. § 881 are applicable to the criminal forfeiture provisions. Decisions holding that the eighth amendment is applicable to RICO forfeitures, see United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987), have wrongly decided that remedial forfeitures at the conclusion of a criminal case are punishment for eighth amendment purposes.

and this, whether the offense be malum prohibitum, or malum in se. The same principle applies to proceedings in rem, on seizures in the admiralty. Many cases exist where the forfeiture for acts done attaches solely in rem, and there is no accompanying penalty in personam. Many cases exist where there is both a forfeiture in rem and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understand the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam. This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America, the jurisdiction over proceedings in rem is usually vested in different courts from those exercising criminal jurisdiction.

The Palmyra, 25 U.S. (12 Wheat.) at 12.

In rem forfeitures have never been equated with amercements, fines or punitive forfeitures. In rem forfeitures were not subject to arbitrary application because only the instrumentality itself was subject to forfeiture. As explained by Justice Story, many cases existed at common law where there was forfeiture in rem based on acts for which there was no accompanying in personam action. This remains the case today. United States v. 141st Street Corp., 911 F.2d 870 (apartment building where drug dealing allowed to occur subject to forfeiture even though the landlord not prosecuted criminally). In rem forfeiture now, as well as historically, has existed to eliminate harmful objects and this is a remedial, not punitive, purpose. The eighth amendment, on the other hand,

was implemented to protect against punitive, not remedial, actions by the government and to protect persons convicted of crimes. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 267.[19]

The eighth amendment prohibition against excessive fines does not apply to compensatory remedies. Compensatory damages are not punitive sanctions and have never been subject to the eighth amendment prohibitions. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 293. Damages comprehend a recompense for losses that have been suffered by means of a wrong done. Id., at 265, n. 6, 7. Amercements and fines were not meant to compensate for damages and were not necessarily related to loss. They were designed to punish the wrongdoer and to express society's displeasure. Id., at 293. A monetary penalty under the eighth amendment is exacted to punish and deter conduct. Id., at 286.

Revenue generated by forfeiture is in the nature of compensatory damages and not a penalty. The government suffers economic loss due to drug trafficking. While certain costs can be calculated, it is impossible to calculate the "seriousness" of a drug sales offense or the "extent of harm caused" by such an offense in purely monetary terms.

That harm consists not only of the illicit profits from the actual drug sale, but the severe

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19. The court has repeatedly interpreted the eighth amendment to apply to punitive, not remedial, sanctions. In Harmelin v. Michigan, 111 S.Ct. at 2693, n. 9, Justice Scalia observed that the eighth amendment applies to punishments, including fines which he described as punishments. The same view is expressed in Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 267. The majority noted that the eighth amendment has long been understood to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments. Id., at 262. The eighth amendment has, for example, been held inapplicable to deportation because deportation is not a punishment for a crime. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). As Justice O'Connor observed in her dissent in Browning-Ferris, the eighth amendment applies to punitive sanctions and was designed to limit penalties enacted in either civil or criminal cases to punish and deter. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 298.

collateral consequences of facilitating drug traffic, such as drug addiction, increased drug related violence, and the government's enforcement costs. All these are ills the drug laws were designed to address. [Citations omitted.]

While the entire magnitude of the national drug problem cannot be laid at the feet of any one drug offender, cf. United States v. A Parcel of Land With a Building Located Thereon, 884 F.2d 41, 44 (1st Cir. 1989), the government is entitled to compensation because of the injury inflicted by [the criminal] conduct. The Supreme Court has recognized that assessing damages is not an exact pursuit, and involves an element of "rough justice." Halper, [490 U.S. 435] 109 S.Ct. at 1902.

United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, 747 F.Supp. 173, 180 (E.D.N.Y. 1990) aff'd, 954 F.2d 29 (2nd Cir.), cert. denied, 113 S.Ct. 55 (1992).

Justice Scalia in Harmelin v. Michigan, 111 S.Ct. at 2693, n. 9, and Justice Blackmun in Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 275-276, n. 21, raised the question whether the eighth amendment prohibition applies to monetary penalties which are awarded to, or shared with, the government. The question presents itself whether forfeitures in which funds are raised for the government are monetary penalties in the same sense that fines are monetary penalties. An instrumentality forfeiture, however, is affected to remove the harmful instrumentality regardless of whether it will result in revenue to the government. A crack house will be forfeited because it presents a danger to the public, even though its forfeiture results in a net loss to the government. A specially modified vehicle, airplane or boat is forfeited so it

can no longer be used to transport drugs, even if those modifications lessen or eliminate the value of the conveyance.

In rem instrumentality forfeiture is a remedial sanction to protect the public from harm, not to raise revenue. Forfeiture pursuant to 21 U.S.C. § 881(a)(7) has been recognized as forfeiture designed to inhibit the operation of narcotics dealers, and not a land acquisition program. United States v. One Single Family Residence, 699 F.Supp. 1531, 1536 (S.D. Fla. 1988).

To the extent revenue is generated,[20] it is appropriate to compensate the government for its expenses in the enforcement of drug laws and for its broader social expenses incurred as a result of the criminal conduct involved.[21]

The exclusion of civil instrumentality forfeiture from the scope of the eighth amendment "excessive fines" prohibition is consistent with the history and spirit of the eighth amendment. In rem forfeitures existed and were used prior to the adoption of the Constitution. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 680-683. The First Congress provided for in

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20. *Some, including many law enforcement advocates of forfeiture, claim the government derives substantial revenue from instrumentality forfeitures. This is largely a myth. While "proceeds" forfeitures, which generally involve money, generate significant income, instrumentality forfeitures often do not result in revenue to the State. State forfeiture experience varies from state to state, but property handling costs are roughly comparable to the experience of the U.S. Customs Service.*

In the 1989 testimony of Government Accounting Office (GAO) before Congress, the GAO reported that on gross seizures with a total appraised value of $438.9 million in FYs 88 and 89, after remissions, expenses, etc., the U.S. Customs Service netted $9.8 million, including an allowance of $9.7 million for the value of property placed into law enforcement service. This is a return of just over two cents per dollar seized. Statement of Richard L. Fogel, before Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, Table 1 and pp. 6-9.

21. *Federally forfeited funds are used for law enforcement purposes. Federal funds shared to state and local governments are also used for law enforcement purposes, including treatment. Many state laws provide that forfeiture funds are to be used for law enforcement purposes. For example, in Arizona and California, forfeited funds are used for law enforcement purposes as well as drug treatment and gang prevention. See, Ariz.Rev.Stats., § 13-2314.01; Cal. Health & Saf. Code, § 11489.*

rem forfeitures involved in customs offenses. Id., at 683. The forfeitures enacted in those early years included forfeitures of ships, the most valuable personal property of the era. The same Congress drafted the Bill of Rights and was fully aware of such forfeiture authority. The Constitution specifically outlawed forfeiture of estate except for treason in Article III, Section 3. The failure of the drafters of the Bill of Rights to prohibit "excessive fines and forfeitures" leads to the logical conclusion that the eighth amendment was not intended to apply to civil instrumentality forfeitures. As civil instrumentality forfeiture is distinctly remedial, wholly apart from a criminal proceeding, it does not constitute a fine subject to the eighth amendment prohibitions.

III. CIVIL INSTRUMENTALITY FORFEITURE IS CONSTRAINED ONLY BY ITS RATIONAL RELATIONSHIP TO THE PURPOSES OF REGULATING, SUPPRESSING AND REMEDYING ILLEGAL CONDUCT

Although civil instrumentality forfeiture is not subject to the prohibitions of the eighth amendment, there is a meaningful limit on the scope of civil forfeiture. Amici suggest that the court has fashioned a reasonable constraint. In Calero-Toledo v. Pearson Yacht Leasing Co., this Court recognized that there was a limit on civil forfeiture when the "rationality" of the forfeiture could not be sustained; in that instance, when the illegal use of the property is in spite of all reasonable efforts by the owner to prevent the proscribed use of the property. 416 U.S. at 689, citing Peisch v. Ware, 4 U.S. (Cranch) 347, 363 (1808). Although not raised directly in the petition, this is an appropriate point at which to fix the "outer limits,"

Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 276, of civil instrumentality forfeiture.

In order to determine the "rationality" of a statutory forfeiture scheme, a two-part inquiry is appropriate. First, what is the nature of the prohibited or regulated conduct which the forfeiture seeks to address and remedy? Second, what purposes or effects are served by the forfeiture in light of the nature of the underlying activity? This inquiry, which examines the nature of the prohibited activity and purposes to be served by the forfeiture, is wholly consistent with this Court's recognition that throughout history, civil instrumentality forfeiture has evolved to meet the challenges of illegal or anti-social conduct. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 681, n. 19.[22]

The economic power (estimated revenues are $150 billion annually) and resilience of the illicit drug industry is based partly on its organizational structure. An understanding of the organizational structure of the drug trafficking business leads naturally to strategies of control that are remedial and entirely unrelated to the punishment of the individual participants, and demonstrates the special rationale of instrumentality forfeiture.

Drug trafficking is structured as a network. It is characterized by an absence of a formal corporate or military style of organization. Network organization is common in legitimate industries, wherever it maximizes the ability of individual businesses to financially succeed. A network grows up spontaneously to link those who are available to perform each of the various activities that must be done in order to accomplish the overall functions of the industry.

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22. *The need for a remedial, economic approach is evident from the economic nature of our core goals. Forfeiture, a remedy used to mold the economics of the Original Colonies under the Navigation Acts, to discourage the slave trade, to disempower the Confederacy and to combat illegal alcohol, Calero-Toledo v. Pearson Yacht Leasing Co., supra, 416 U.S. at 683, has been brought to bear on the narcotics networks. Its unique qualifications to assist in the economic control of the illegal drug industry are at the heart of its rational basis and practical success.*

Cocaine trafficking requires production, processing, transportation, distribution, and money laundering. Other cocaine industry participants work closely with people carrying on criminal activities necessary to generate the money needed by purchasers, such as fencing and property crimes.

The cocaine industry also generates support service businesses. They include financial and legal advisers, corruptors, specialized money launderers, and most significantly, providers of necessary property and materials.

The entire industry is made up of individual participants, each operating at some level of dominance in whatever functional component or components of the industry they select, taking their profits on an individual basis from each venture they engage in. The essential property and money that must be used to make each necessary act occur, from production through consumption, is provided in diffused fashion by each participant according to their own needs. Thousands of miles and dozens of transactions separate the cocoa leaf farmer in the Peruvian foothills from petitioner on the plains of South Dakota, but both are part of a huge network maintained to bring cocaine to the ultimate user. In fact, petitioner, as the retailer, is indispensable to the network and the proximate cause of the billions of dollars social costs resulting from the use of illegal drugs.

Because property is the power supporting this network, removal of this essential property is the objective of forfeiture, completely apart from and not connected to punishment of offenders. The economic effect of forfeiture addresses the mathematics of illegal industries. To operate the $150 billion/year gross retail illegal United States drug industry, thousands of participants use hundreds of billions of dollars in property, contributed through a vast network. The government, federal, state and local, seizes between $1 and $2 billion per year, most of it "proceeds" or profits, not instrumentalities, so the risk of seizure of a particular asset for facilitating a drug offense is a fraction of 1%. Assets that are used to facilitate crime are generally used more than once. The risk of loss of

property associated with any single use of a particular asset is therefore some fraction of 1%.

Forfeiture is uniquely suited to make the most of its limited economic impact compared to the total size of the industry it addresses. Unlike a tax or a mandated expense, forfeiture is not easily planned for. Its unpredictable occurrence may fall upon any network asset at any time, so it has disruptive potential far beyond the dollar value of its interference.

The avowed purposes of the anti-narcotics forfeiture statutes have been identified as interfering with criminal activity by removing the instrumentality from the offender and from the network of which their activity is a part; removing the incentive to engage in illegal activity by imposing economic sanctions on criminal conduct and on supporting activities; securing enforcement of regulatory and revenue statutes; imposing a duty of care on those whose property might be used as an instrumentality of a crime; and financing government efforts designed to prevent, eliminate and pay the costs of criminal activity. See Caplin & Drysdale v. United States, 491 U.S. at 630; Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 687-688; United States v. Santoro, 866 F.2d at 1544; United States v. D.K.G. Appaloosas, Inc., 829 F.2d 532, 544 (5th Cir. 1987).

Civil instrumentality forfeiture serves the remedial purposes of the forfeiture statutes precisely. It interferes with the criminal activity by removing the very objects which are used to facilitate and continue the criminal act. Indeed, the civil remedy is perfectly tailored to its overriding purpose - the removal of the economic assets employed in trafficking activity. Additionally, instrumentality forfeiture works to enforce a duty of care on property owners by placing at appropriately limited risk property which is used for criminal purposes.

Thus, civil instrumentality forfeiture, particularly as embodied in § 881 of Title 21, sustains its "rationality" in light of the highly capitalized, network structure of the illicit drug industry to which it is addressed and the identified purposes or

goals set out for such forfeitures. Certainly, as drafted and as generally applied, forfeiture under § 881 bears a rational relationship to the goals and purposes of regulating, suppressing and remedying the illegal trade in narcotics.

In opposition to the obviously rational relationship between civil instrumentality forfeiture and the remedial goals and effects of the forfeiture statutes, Petitioner argues that instrumentality forfeiture can be disproportionate or irrational. The argument proceeds: The amount of loss visited on the property owner may have no relationship to the seriousness of the particular underlying offense, the extent of harm caused by that particular act, or the property owner's culpability or degree of involvement in the specific offense. Brief for Petitioner, at 43, 46-47. Such reasoning must necessarily fail. As the Ninth Circuit observed: "In [civil] forfeitures there is no necessary relation between the value of the property forfeited and the loss to the government, nor is there any necessary proportion between the value of the property forfeited and the criminal use of the property." United States v. McCaslin, 959 F.2d at 788.

Or as otherwise stated: "The value of the property is not inevitably related to the harmfulness of the use to which it is put." United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, 747 F.Supp. at 181; see also, United States v. 141st Street Corporation, 911 F.2d at 881.

As previously discussed, the absence of a relationship between the value of the asset and the harm of the offending act is not irrational. To the contrary, it properly comprehends the calculated risk of loss versus expected gain from each illegal use of the property.

The Ninth Circuit has provided a suitable example:

> *Jaffee chose to conduct his small farming operations on his own land which was subject to the risk of forfeiture. Some of his colleagues in the same business planted their crops on land*

> *already owned by the United States and managed somewhat randomly by various federal agencies. These growers faced the constant risk of losing their crop, but not that of losing their land.*

United States v. Tax Lot 1500, TP., 861 F.2d 232, 235 (9th Cir. 1988).

The effort to test "proportionality" based on balancing the seriousness of the particular offense, the extent of harm caused by it or the culpability of the offender-owner against the value of the property forfeited is pointless and doomed to failure. See, e.g., United States v. Pryba, 900 F.2d 748, 757 (4th Cir. 1990), cert. denied, 111 S.Ct. 305 (1991). The calculation cannot realistically be made. Petitioner's further suggestion to factor the owner's financial condition, the nature of the property (as a residence), the "degree" of the involvement of the property in the offense, the severity of the crime and criminal punishment and the government's costs, Brief for Petitioner, at 47, is irrational. Most of these factors have no relation to the remedial purpose of the forfeiture statutes. These factors would be appropriate only if forfeiture is punishment, which it is not. Indeed, consideration of these factors would turn civil instrumentality forfeiture on its head and drain it of all purpose.

Considerations of monetary value, financial condition, or protected interests in the property itself are irrelevant considerations to the rationality of the forfeiture. Referring to the deodand concept, if used in a murder, the prince's Excalibur is every bit as subject to forfeiture as the plowman's knife. Or, as the Fourth Circuit recently observed, "The Ferrari is at least as harmful an instrumentality as the Chevette." United States v. Cullen, 979 F.2d at 995. The nature of the offending object, in terms of its place in our hierarchy of property values, is equally irrelevant. It does not

matter that, for example, the drug dealer chooses to store his contraband in a rented warehouse or his family residence.

Further, it is impossible to calculate the "seriousness" of a drug sales offense or the "extent of harm caused" by such an offense in purely monetary terms, which is, at bottom, what Petitioner's argument is all about. As one court observed: "That harm consists not only of the illicit profits from the actual drug sale, but the severe collateral consequences of facilitating drug traffic, such as drug addiction, increased drug related violence, and the government's enforcement costs. All these are ills the drug laws were designed to address. [Citations omitted.]" United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, *747 F.Supp. at 180; see also,* United States v. 141st Street Corporation, *911 F.2d at 881.*

As applied in this case, the forfeiture of the trailer and body shop used by Petitioner to facilitate his distribution of cocaine is a rational response to the illicit use of the property without regard to any factors suggested as relating to "proportionality." The forfeiture precisely served the purposes of this remedial statute to remove the objects from the drug network, impose a disincentive, and compensate the government for its loss. The forfeiture here was rational and, therefore, proper.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should uphold the long-held position that the eighth amendment does not constrain civil instrumentality forfeiture. Further, amici suggest that the Court's jurisprudence traceable through the Calero-Toledo *decision would sustain a civil forfeiture which is rationally related to the purposes of regulating, suppressing and remedying illegal conduct.*

DATED: March 29, 1993.

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Petitioner

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UNITED STATES OF AMERICA,

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I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700; P.O. Box 85266, San Diego, California 92186-5266.

I have served the within BRIEF OF AMICI CURIAE STATES OF ARIZONA AND CALIFORNIA, IN SUPPORT OF RESPONDENT as follows:

To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing four copies in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 29th day of March, 1993.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, March 29, 1993.

Lidia Hernández
LIDIA HERNANDEZ

Subscribed and sworn to before me this 29th day of March, 1993.

Anne Marie Buford
Notary Public in and for said County and State

ANNE MARIE BUFORD
Notary Public—California
County of San Diego
My Commission Expires 11/19/93

No. 92-6073

In the Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD LYLE AUSTIN,
Petitioner

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES, COMMUNITY ANTI-DRUG COALITIONS OF AMERICA, SULPHUR SPRINGS ACTION LEAGUE, LOGAN CIRCLE COMMUNITY ASSOCIATION, EAST DUPONT CIRCLE COMMUNITY ASSOCIATION, UNITED CITIZENS AGAINST NARCOTICS, TOGETHER! THURSTON COMMUNITIES FOR A DRUG-FREE YOUTH, AND GEORGE F. WARD AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Eighth Amendment's prohibition against excessive fines applies to civil forfeiture proceedings.

2. Whether, if the Eighth Amendment applies, the forfeitures in this case violate the Excessive Fines Clause.

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INTEREST OF AMICI CURIAE

Amici are a group of national, regional, and local citizens groups and a county prosecutor acting in his individual capacity, all dedicated to combatting the per-

nicious effect of illicit drugs and drug-related crimes.[1] Strengthening the role of community-interested groups

[1] The *American Alliance for Rights and Responsibilities* ("AARR") is a non-profit public interest group dedicated to restoring a pragmatic balance between rights and responsibilities in American life. Through research, public education, and litigation efforts, the AARR works to encourage community service, combat substance abuse, protect public safety, and promote the amenability of public spaces to common uses. AARR has published the only national survey to identify effective, balanced, and constitutional techniques for combatting open-air drug markets: R. Conner & P. Burns, *The Winnable War: A Community Guide to Eradicating Street Drug Markets* (1991).

The *Community Anti-Drug Coalitions of America* ("CADCA") is a nationwide umbrella organization which has grown out of the community-level organizing efforts of the President's National Drug Advisory Council. CADCA provides technical assistance, conferences, workshops, and legal guidance to its member community groups.

The *Sulphur Springs Action League* is a grass-roots community organization in the Tampa, Florida area dedicated to fighting open-air street drug markets and promoting safe, healthy neighborhood environments.

The *Logan Circle Community Association* and the *East DuPont Circle Community Association* are devoted to strengthening community life in their respective inner-city neighborhoods near the heart of Washington, D.C. Both associations are active supporters of motor vehicle and other asset forfeitures as effective tools to combat street drug trafficking, prostitution, and violence in their communities.

United Citizens Against Narcotics is a city-wide coalition of community activists in the Pittsburgh, Pennsylvania area engaged in a wide array of anti-drug public service activities.

Together! Thurston Communities for a Drug-Free Youth is active in efforts to combat drug abuse in the Olympia, Washington area. *Together!* has also participated in White House sponsored national anti-drug conferences.

Finally, *George F. Ward* is an attorney and Chief Assistant Prosecutor for Wayne County, Michigan. Mr. Ward has been instrumental in the design and implementation of the County's PUSH-OFF program (when Purchasers Use our Streets and Highways, Opt For Forfeiture) which has proven highly effective as a means to attack the blight of open-air drug markets.

The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk under Rule 36.3 of the Rules of this Court.

such as amici in the fight against illegal drugs has been identified as "one of the cornerstones" of the national drug prevention strategy. The White House, *National Drug Control Strategy: Progress in the War on Drugs 1989-1992*, p. 10 (January 1993).

Because of petitioner's contentions that an Eighth Amendment proportionality requirement (i) applies to civil *in rem* forfeiture proceedings directed at property tainted by drug crimes, and (ii) should be determined by reference to the market value of the contraband involved, rather than by reference to the gravity inherent in all drug crimes, amici wish to bring to the Court's attention certain of the critical countervailing considerations bearing on the issues presented.

Amici are especially concerned with the under-recognized and grave damage inflicted on their neighborhoods and communities by flagrant open-air street drug markets. More particularly, amici have observed how civil asset forfeiture—as a complement to other methods of public law enforcement—has proven effective in combatting these drug markets. Indeed, in the pursuit of illicit drug *buyers*, automobile forfeiture has been singularly successful in tackling a facet of the drug problem that has otherwise proven to be largely immune from the reach of law enforcement.

Although the specific facts of petitioner's drug crime might initially appear somewhat removed from these concerns, any decision by this Court as to the applicability of Eighth Amendment proportionality analysis to civil *in rem* asset forfeiture proceedings in the context of the enforcement of anti-drug laws will have direct consequences for amici's common mission.

SUMMARY OF ARGUMENT

For the reasons stated in the government's brief, amici submit that the Eighth Amendment is not applicable to civil *in rem* forfeiture proceedings. However, should this Court determine, despite the civil *in rem* nature of this proceeding, that the Eighth Amendment does apply to forfeitures of drug-related property and that a proportionality test is appropriate, amici contend that the proper proportionality analysis should weigh the significance of the forfeiture against the potential harm posed by the underlying misconduct giving rise to the forfeiture proceeding. In the context of criminal drug activity, amici submit, the gravity of the underlying misconduct is such that forfeiture could be grossly disproportional only in rare instances (and certainly not here). This view recognizes the seriousness of all illicit drug crimes as determined by Congress (and especially those committed in flagrant drug markets) and affords the certainty of result and ease of application essential to deterrence and needed to discourage meritless and highly fact-specific litigation challenges.

ARGUMENT

I. THE PLAGUE OF ILLICIT DRUGS IS AMONG THE MOST SERIOUS PROBLEMS FACING OUR NATION.

In arguing for an Eighth Amendment proportionality test for civil forfeitures of drug-related property, both petitioner and the amici supporting his position attempt to gloss over the central facts in this case: petitioner is, by his own plea, guilty of dealing cocaine, and the property subject to forfeiture in this *in rem* proceeding played a crucial role in facilitating petitioner's drug crime. Any meaningful proportionality analysis in this context *must* take into account the grievous social consequences of all drug crimes and the human, social, and economic devastation they leave in their wake.

Indeed, it is the inestimable damage, both direct and indirect, caused by drug dealers and abusers alike, that is the relevant cost against which the magnitude of the forfeiture must be measured. To assess the severity of the relevant underlying misconduct by reference solely to the market value of the contraband viewed in isolation is to defy common sense and to deny the harms wrought by illegal drugs on our citizens, our communities, and our country as a whole. *See, e.g., People v. Broadie*, 37 N.Y.2d 100, ——, 332 N.E.2d 338, 342, *cert. denied*, 423 U.S. 950 (1975) (primary consideration in assessing gravity of criminal conduct is the harm it causes to society).[2]

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[2] Indeed, if petitioner's "value of contraband versus value of seized assets" approach were to be adopted, it would tend—in the context of civil forfeiture actions against automobiles of open-air drug market customers—to have the anomalous effect of conferring a greater level of protection on the more expensive cars driven by more affluent drug criminals. The Eighth Amendment's prohibition against excessive fines should not be converted into a safe haven for Jaguars and Mercedes Benzes driven by drug sellers or buyers.

If constitutional proportionality analysis is to be applied at all in forfeiture proceedings under 21 U.S.C. § 881, it must not be divorced from a recognition of the societal ills inflicted by drug trafficking and abuse.

This Court has repeatedly recognized that the scourge of illegal drugs constitutes "one of the greatest problems affecting the health and welfare of our population." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989). Congress too, as part of the same Comprehensive Crime Control Act of 1984 that amended the forfeiture provisions of 21 U.S.C. § 881(a), made the following express findings:

> (1) The flow of illegal narcotics into the United States is a major and growing problem.
>
> (2) The problem of illegal drug activity falls across the entire spectrum of Federal activities both nationally and internationally.
>
> (3) Illegal drug trafficking is estimated by the General Accounting Office to be an $80,000,000,000 per annum industry in the United States.
>
> (4) The annual consumption of drugs has reached epidemic proportions.
>
> (5) Despite the efforts of the United States Government and other nations, the mechanisms for smuggling opium and other hard drugs into the United States remain virtually intact and United States agencies estimate that they are able to interdict no more than 5 to 15 percent of all hard drugs flowing into the country.
>
> (6) Such significant indicators of the drug problem as drug-related deaths, emergency room visits, hospital admissions due to drug-related incidents, and addiction rates are soaring.
>
> (7) Increased drug trafficking is strongly linked to violent, addiction-related crime and recent studies have shown that over 90 percent of heroin

> users rely upon criminal activity as a means of income.
>
> (8) Much of the drug trafficking is handled by syndicates, a situation which results in increased violence and criminal activity because of the competitive struggle for control of the domestic drug market.
>
> (9) Controlling the supply of illicit drugs is a key to reducing the crime epidemic confronting every region of the country.

Public Law 98-473, Section 1302(a), 98 Stat. 1837, 2168 (1984), *repealed by* Public Law 100-690, § 1007(a)(3), 102 Stat. 4181, 4187 (Anti-Drug Abuse Act of 1988).

By any measure, this intractable plague is of epidemic proportion. It has been estimated that Americans consume approximately sixty percent of the world's illegal drug output. J.S. Lang, "America On Drugs," *U.S. News & World Report*, p. 48 (July 28, 1986). Even the most conservative estimates place the number of drug abusers in this country "well into the millions." Department of Justice, *Drug Trafficking: A Report to the President of the United States*, p. 2 (August 3, 1989).

Of graver significance, however, than the direct harm suffered by abusers of illiict drugs is the collateral devastation drugs bring to our nation's social fabric. As a recent National Crime Prevention Council publication has explained:

> Communities across the country are struggling to deal with the drug issue, a crime problem that has taken on crisis proportions. Over and over again, in both urban and rural settings, it has been demonstrated that an active drug trade precipitates and perpetuates the disintegration of neighborhoods. Drug trafficking sends tremors through the entire community, even when most of the activity is concentrated in particular neighborhoods. It signals a community out of control, a hostile environment for

> business, a dangerous place to raise a family. Every part of the United States suffers from the effects of illicit drugs and related crime: violence, weakened local economies, suburban flight, joblessness, and fear. . . . In those neighborhoods where a drug trade visibly flourishes, residents' daily lives are disrupted. Children avoid areas near schools and playgrounds where drugs are sold; they are enticed to take part in drug trafficking for money or other material goods. Other residents, intimidated by loitering groups, retreat behind barred windows and locks. Neighborhood businesses close their doors; community ties erode. Depression and isolation grip the whole area.

Creating a Climate of Hope: Ten Neighborhoods Tackle the Drug Crisis, p. 1 (1992). In particular, flagrant drug markets have the effect of inhibiting community life, perpetuating drug abuse by tempting recovering addicts and the young, and promoting negative values by suggesting a spurious shortcut to material success.[3]

Among the cruelest aspects of the illegal drug plague is the toll it takes on our nation's youngest, most innocent victims. A recent report commissioned by the Senate Judiciary Committee reveals that over the past three years approximately 900,000 American children have been addicted to some kind of illicit drug. Inter Press Service, "United States: Anti-Drug Campaign A Failure Says Senate Report" (September 10, 1992).

Beyond the immediate health threat (and its concomitant cost) posed by infant addiction, child neglect and abuse by parents on drugs are yet another facet of the problem. In fact, a report issued by the New York City Human Resources Administration, after demonstrating a strong correlation between parental drug abuse by parents and child deaths resulting from abuse and neglect,

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[3] *See also* R. Conner & P. Burns, *The Winnable War: A Community Guide to Eradicating Street Drug Markets*, pp. 5-8 (1991) (describing the deleterious impact of street drug markets on the neighborhoods they occupy).

concluded: "Drug abuse by parents, a problem which is apparently growing at an alarming rate, continues to pose *the greatest single threat to children*." Quoted in P. Kerr, "Crack Addiction: The Tragic Toll on Women and Their Children," *The New York Times*, p. B1 (February 9, 1987) (emphasis added). It scarcely needs to be noted that the child abuse, neglect, and abandonment associated with drug-abusing parents "is placing unprecedented strains on the family court system and social agencies." N. Lewis, "Child Neglect, Abuse Up 60% in D.C.," *The Washington Post*, p. A1 (May 20, 1992).

Equally alarming is the overwhelming correlation between illicit drugs and criminal activity. According to one federal district judge, more than fifty percent of the federal prison population of roughly 67,000 inmates are serving time for drug offenses. L.F. Oberdorfer, "A Safety Valve for U.S. Prisons," *The Washington Post*, p. A21 (June 23, 1992). Of the nation's local jail populations, nearly a quarter of the inmates are incarcerated due to drug offenses. *Alcoholism & Drug Abuse Week*, vol. III, no. 32, p. 3 (August 28, 1991).

In addition to drug offenses themselves, illegal drug use and trafficking are integrally linked to other serious crimes. *Most* of the 71,000 people murdered in this country over the past three years are dead because of drugs. Inter Press Service, "United States: Anti-Drug Campaign a Failure Says Senate Report" (September 10, 1992) (citing Senate Judiciary Committee report). Indeed, a 1988 survey of state prisoners incarcerated for murder revealed that twenty-eight percent admit to having been under the influence of drugs at the time they committed the killing. Bureau of Justice Assistance, U.S. Department of Justice, *1988 Report on Drug Control*, p. 19 (1989). As for violent crimes generally, the correlation was even greater, with more than a third of state prisoners admitting to being under the influence of illicit drugs when they committed the violent offense.

Id. at 2. It has been reported that fully forty-two percent of prisoners serving time for robbery were using drugs when they committed their crimes. J. Dillin, "Drug Use Linked to Many Crimes in U.S.," *The Christian Science Monitor*, p. 2 (September 5, 1989).

Property crimes like burglary, auto theft, and larceny are frequently committed by drug addicts to feed their habits. *Id.* A study by the Bureau of Justice Statistics showed that roughly a third of those persons in jail for burglary and robbery committed their crimes in order to raise money to feed their drug addictions. "Drugs Strongly Linked to Robbery and Burglary," *Alcoholism & Drug Abuse Week*, p. 3 (August 28, 1991).

Statistical evidence compiled by the National Institute of Justice/Drug Use Forecasting Program reveals the alarming degree to which drug use and criminal behavior are linked. The data appearing as Appendix A hereto demonstrates—by means of urinalysis testing in major cities across the country from 1988 through 1991—that upwards of eighty percent of criminal arrestees routinely test positive for illegal drug use. Appendix B hereto shows the same overwhelming correlation, broken down by the offense charged at the time of arrest.

No less disturbing are the figures on juvenile crime linked to drug abuse. A study conducted in 1991 by the Washington, D.C. Pretrial Services Agency showed that seventeen percent of juveniles arrested in the District tested positive for cocaine use, with fully thirty percent of those arrested on weapons charges testing positive for drug use. N. Lewis, "Drug Use Up Among Young Suspects," *The Washington Post*, p. D1 (August 23, 1991).

In addition to the destructive impact of drug trafficking on the lives of individuals, families, and communities, the economic costs to society as a whole are profound. Federal drug control funds expended for fiscal year 1993 total $12.7 billion dollars. The White House, *National Drug Control Strategy: A Nation Responds to*

Drug Use, p. 8 (January 1992). As of 1990, nearly 19,000 state and local law enforcement officers were devoted *full time* to special drug enforcement units. Bureau of Justice Statistics, *National Update*, p. 6 (July 1992). In this era of deficit reduction and fiscal belt-tightening, it is readily apparent that public funds diverted to the investigation and prosecution of drug criminals like petitioner are thereby unavailable for alternative public purposes.

Moreover, the underground economy in which petitioner was a knowing merchant is believed, by Internal Revenue Service estimates, to amount to nearly $30 billion a year. Department of Justice, *Drug Trafficking: A Report to the President of the United States*, p. 3 (August 3, 1989). Of course, that economy operates outside the reach of the income tax system to which the rest of society is subject, thereby magnifying even more the adverse fiscal impact of drug trafficking.

Further compounding the economic damage inflicted by drug abuse (and the trafficking that makes it possible) is its effect on the workplace. The economic burden attributable to slowed productivity, absenteeism, lateness, and irrational decision-making by drug using workers was estimated as of 1983 to amount to as much as $25 billion dollars. S. Rep. No. 278, 98th Cong., 2d Sess. 12, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3587, 3598 (Report of Judiciary Committee on National Narcotics Act of 1984). Indeed, drug abuse at the workplace "is a problem of crisis proportions." Department of Justice, *Drug Trafficking: A Report to the President of the United States*, p. 5 (August 3, 1989). Thus, a 1984 government study estimated the annual cost of unrealized productivity due to drug use at $33 billion. *Id.* Increased workplace accidents and workers' compensation and health benefit claims attributable to illicit substance abuse add still further to the economic burden. *Id.*

Although the sheer magnitude and multiplicity of the problem prevents precise valuation, it has been estimated that "[t]he illegal-drug crisis in the United States now costs the nation at least $100 billion annually—or $1,500 a year for a typical family of four." J. Dillin, "War on Drugs: Bush Prepares to Launch Damage Control Strategy," *The Christian Science Monitor*, p. 1 (September 5, 1989).

Much as they might prefer it otherwise, petitioner and other participants in the illicit drug trade cannot divorce the culpability of their drug crimes from the devastating consequences for which they are inextricably responsible.

II. CONGRESS HAS DETERMINED THAT SIGNIFICANT CIVIL *IN REM* FORFEITURES ARE A NECESSARY COMPLEMENT TO CRIMINAL ENFORCEMENT IN COMBATTING THE SCOURGE OF ILLEGAL DRUG MARKETS, TRAFFICKING, AND ABUSE.

In enacting the Comprehensive Crime Control Act of 1984 (Public Law 98-473), of which the Comprehensive Forfeiture Act of 1984 was a part, Congress revisited and broadened the scope of Section 881(a)'s civil forfeiture provisions. The legislative history of the Act is unequivocal that its purpose, in relevant part, was "to enhance the use of forfeiture . . . ." S. Rep. No. 225, 98th Cong., 2d Sess. 191, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3374 (Report of Judiciary Committee). More specifically, the Senate Report on these forfeiture provisions explained: "Clearly, if law enforcement efforts to combat . . . drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made." *Id.*

Animating this legislative purpose of expanding these forfeiture provisions was Congress' express recognition of the gravity and magnitude of the nation's illicit drug

problem. As the Third Circuit has observed, this legislative determination constitutes "a permissible civil response by Congress to complement criminal law enforcement directed at a most corrosive force in our society." *United States v. One 107.9 Acre Parcel of Land Located in Warren Township, Bradford County, Pa.*, 898 F.2d 396, 401 (3d Cir. 1990).

Civil *in rem* asset forfeiture, as intended by Congress, has proven to be a highly effective complement to criminal drug law enforcement. Many drug criminals use automobiles to transport illiict drugs to or procure them from drive-through street drug markets. These open-air markets destroy the neighborhoods they infest, while the dealers who supply them and the customers who sustain them are able to drive their cars away to safer, relatively crime-free neighborhoods. Civil asset forfeitures directed against drug-buyer vehicles have proven to be particularly effective in eradicating these street markets, thereby affording residents a chance to reclaim their neighborhoods and communities. The importance of drug law enforcement efforts focusing on the consumers of illicit drugs has gained even greater congressional recognition in recent years. *See* Public Law 100-690, title V, §§ 5001-5301 (Anti-Drug Abuse Act of 1988, User Accountability provisions). Thus, the "seizure and forfeiture of vehicles [and other crime-tainted assets] for violation of narcotics laws fosters the public interest." *United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817, 821 (9th Cir. 1981).

Moreover, it must be kept firmly in view that it is within the unique competence of the legislature to assess the gravity of, and fashion remedies to address, the problems posed by criminal drug activity. *See Harmelin v. Michigan*, —— U.S. ——, 111 S. Ct. 2680, 2698 (Scalia, J.), 2703 (Kennedy, J.) (1991). Congress has unambiguously provided for the sort of civil *in rem* forfeiture challenged in this case, and has lucidly articu-

lated its reasons in so doing. The Eighth Amendment simply affords no basis for undermining this thoroughly reasonable legislative determination, particularly where such a compelling governmental interest has been demonstrated.[4]

III. ANY EIGHTH AMENDMENT GROSS DISPROPORTIONALITY TEST IN THIS CONTEXT SHOULD TAKE INTO ACCOUNT THE SERIOUSNESS OF THE HARM CAUSED BY CRIMES INVOLVING ILLEGAL DRUG MARKETS, TRAFFICKING, AND ABUSE.

As the government's brief shows, the weight of authority holds that civil *in rem* forfeiture proceedings are altogether beyond the compass of the Eighth Amendment. However, if the Eighth Amendment were somehow deemed to apply to such forfeitures, and if a concept of proportionality were deemed to be part of that application, the proper constitutional standard would be one of *gross disproportionality*, and bearing no relationship to ongoing criminal activity. *See, e.g., Solem v. Helm*, 463 U.S. 277, 290-92 (1983); *United States v. Certain Real Property, 566 Hendrickson Blvd., Clawson, Oakland County, Mich.*, —— F.2d ——, 1993 WL 47733 (6th Cir. February 26, 1993).

This constitutional standard is highly deferential, coming into play (if at all) only in the most extreme circumstances. *United States v. One 107.9 Acre Parcel of Land, Warren Twp., Pa.*, 898 F.2d 396, 400 (3d Cir.

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[4] *Cf. Harmelin, supra*, 111 S. Ct. 2680 (upholding mandatory life sentence without possibility of parole for possession of 672 grams of cocaine by defendant with no prior felony convictions); *Hutto v. Davis*, 454 U.S. 370 (1982) (upholding forty-year prison sentence plus fine of $20,000 for possession and distribution of nine ounces of marijuana); *Gutierrez v. Moriarty*, 922 F.2d 1464, 473 (10th Cir.), *cert. denied*, —— U.S. ——, 112 S. Ct. 140 (1991) (upholding life sentence meted out for distributing "minuscule" quantity of heroin).

1990) ("Only the clearest proof will suffice to support a finding of unconstitutionality."); *United States v. Contreras*, 937 F.2d 1191, 1195 (7th Cir. 1991) ("[N]o small disproportion will do . . ."); *United States v. Certain Real Property and Premises, 38 Whalers Cove Drive, Babylon, N.Y.*, 954 F.2d 29, 38 (2d Cir. 1992) ("The Eighth Amendment proscribes only extreme punishments.").

Of course, to identify a "gross disproportionality" standard is to beg the question: Against what is the magnitude of the forfeiture to be measured? Whatever test might be adopted, its basic focus should be on the relationship between the forfeiture and the gravity of the crime committed. The gravity of the offense is, in turn, measured by reference not simply to the street value of the illicit drugs involved but also to the harmful nature of the crime and its collateral consequences. *United States v. Sarbello*, —— F.2d ——, 1993 WL 20118, *6 (3d Cir. February 2, 1993) ("moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach"). *See United States v. Certain Real Property and Premises, 38 Whalers Cove Drive, supra*, 954 F.2d at 38-39 (recognizing "serious threat to individuals and society posed by drug offenses," in rejecting Eighth Amendment challenge to civil forfeiture); *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987) (harm caused by defendant's conduct, including "whether the crime has severe collateral consequences, *e.g.*, drug addiction," is relevant consideration in assessing gravity of offense); *People v. Broadie*, 37 N.Y.2d 100, 332 N.E.2d 338, 342, *cert. denied*, 423 U.S. 950 (1975) ("In assessing the gravity of a criminal offense, the primary consideration is the harm it causes to society.").

Petitioner's contrary argument that the forfeiture should be examined with reference merely to the market value of the illegal substance at issue is a variation of

the de minimis argument that has consistently been rejected by the courts. *See, e.g., United States v. Certain Real Property, 566 Hendrickson Boulevard, Clawson, Oakland County, Michigan*, —— F.2d ——, 1993 WL 47733 (6th Cir. February 26, 1993) ("Forfeiture has been enforced even for truly de minimis infractions."); *United States v. Premises Known as 3639 2nd Street, Northeast, Minneapolis, Minnesota*, 869 F.2d 1093 (8th Cir. 1989) ("Nor do we find merit in any underlying 'de minimis' argument that the sale of a relatively small amount of cocaine does not warrant forfeiture of the house . . . ."); *United States v. A Parcel of Land with a Building Located Thereon at 40 Moon Hill Road, Northbridge, Massachusetts*, 884 F.2d 41, 44-45 (1st Cir. 1989) (rejecting argument that forfeiture of home for allegedly de minimis infraction violated the Eighth Amendment); *United States v. 1985 BMW 635*, 677 F. Supp. 1039, 1042 (C.D. Calf. 1987) (forfeiture of $35,000 automobile used to transport 6.23 grams of cocaine and 2.78 grams of concentrated cannabis found not 'grossly disproportionate' to the offense committed).

Both federal and state governments have enacted legislation providing for the forfeiture of firearms, vehicles, and other instrumentalities used in the violation of fish and game laws. *See, e.g., Smith, Owner of the Sloop Volant v. Maryland*, 59 U.S. (18 Howard) 71, 75 (1855) (upholding seizure of fishing vessel); *United States v. Van Horn*, 836 F.2d 1235 (9th Cir. 1988) (upholding seizure of aircraft); *In re Forfeiture of One 1984 Ford Van 150, One 30-30 Winchester*, 521 So. 2d 224 (Fla. Dist. Ct. App. 1988) (forfeiture provisions in statute prohibiting taking of certain wildlife out of season are mandatory); *North Dakota v. Backer*, 331 N.W.2d 4 (N.D. 1983) (forfeiture of vehicle unlawfully used in taking game). If forfeitures of such magnitude are appropriate to protect fish and game, they are, *a fortiori*, appropriate to protect human lives and communities from the scourge of illegal drugs.

Other courts that have discussed forfeiture of drug crime-tainted assets in light of Eighth Amendment concerns have virtually all held that the forfeiture was not grossly disproportional. Although there may conceivably be situations where a forfeiture challenged as an excessive fine would not survive judicial scrutiny under the Eighth Amendment, this case is not one of them.[5]

Petitioner and the *amici* supporting his position urge this Court to adopt an Eighth Amendment proportionality analysis premised upon "the need for intensive case-by-case factual determinations." *Brief Amicus Curiae of the National Association of Criminal Defense Lawyers*, at 15. The Eighth Amendment was never intended, however, to serve as an invitation to burdensome, protracted, and ultimately meritless litigation. *Solem v. Helm*, 463 U.S. 277, 290 (1983) (proportionality challenges outside of death penalty context should be "extremely rare"). To be effective for its congressionally intended purpose, the propriety of civil *in rem* forfeiture of property used to facilitate drug crime must be freed from doubt in substantially all cases.

CONCLUSION

For all of the reasons stated above, as well as those set forth in the government's brief, amici respectfully request this Court to affirm the opinion of the Eighth Circuit. However, should this Court determine civil *in rem* forfeiture proceedings are within the purview of the Eighth Amendment, and that a proportionality test is applicable, amici submit that the focal point of analysis

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[5] *See, e.g., United States v. Certain Real Property, 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1992) (forfeiture of entire $68,000 interest in condominium in connection with sale of small amount of cocaine valued at $250 not grossly disproportional). *Cf. Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (seizure from innocent owner of $19,800 yacht on which single marijuana cigarette was found did not offend due process).

should be the severe harm caused by drug crimes (as recognized by Congress) and not merely the street value of the particular drugs involved.

Respectfully submitted,

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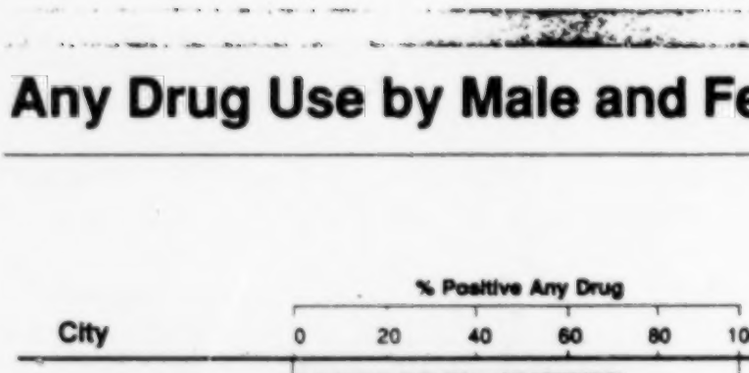
March 31, 1993

APPENDICES

Any Drug Use by Male and Female Arrestees*



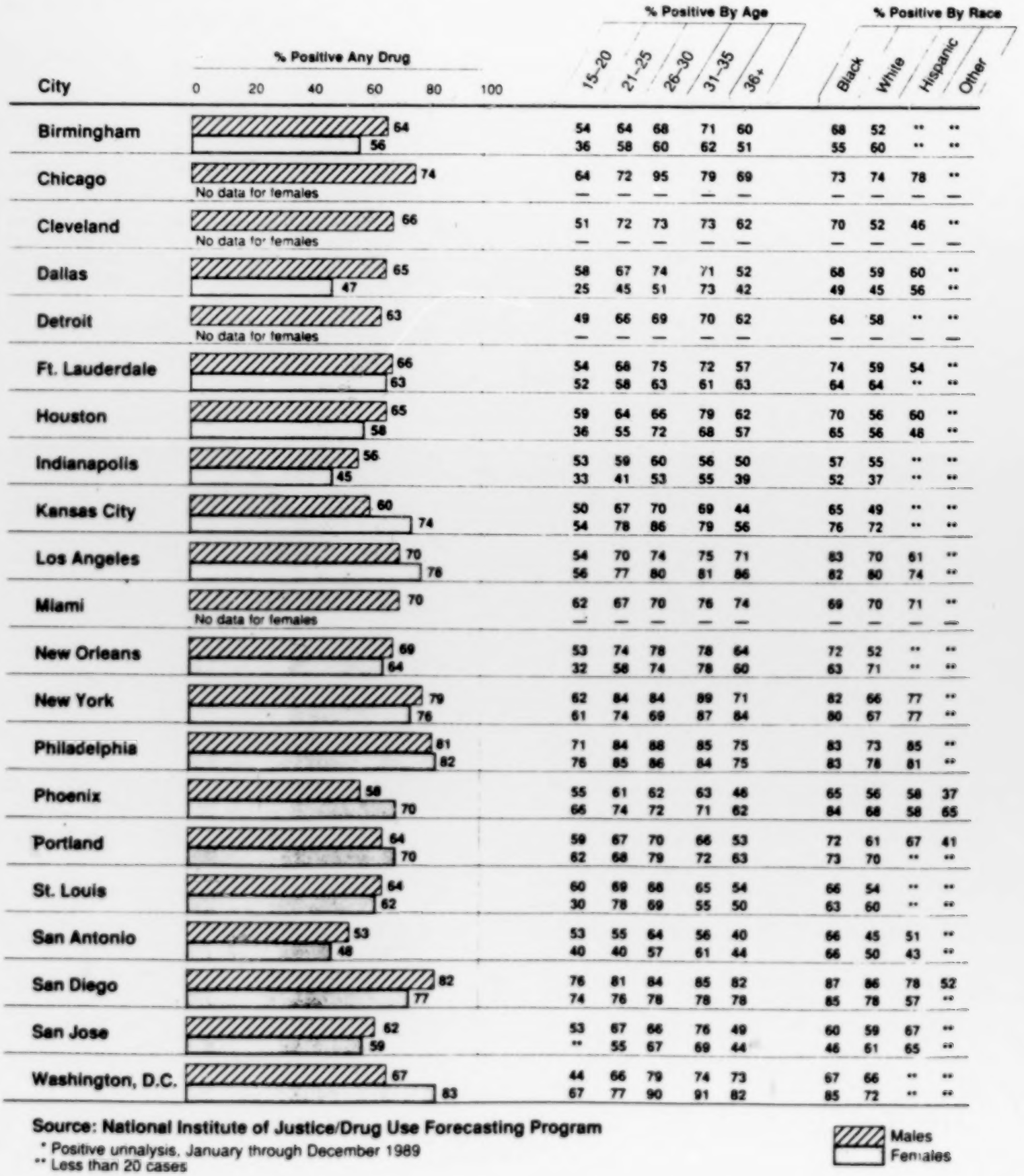
City	% Positive Any Drug	% Positive By Age					% Positive By Race			
		15–20	21–25	26–30	31–35	36+	Black	White	Hispanic	Other
Birmingham	72	58	75	86	69	62	74	69	**	**
	65	**	**	**	**	**	58	75	**	*
Chicago	80	70	83	84	88	74	82	71	72	**
	77	**	84	82	**	**	77	**	**	**
Cleveland	68	55	76	76	76	58	71	60	**	**
No data for females		—	—	—	—	—	—	—	—	—
Dallas	66	57	66	77	77	52	69	63	49	**
	65	66	61	76	60	55	63	68	**	**
Detroit	68	63	68	69	65	75	70	57	**	**
	81	**	84	82	**	**	81	82	**	**
Ft. Lauderdale	62	58	82	64	63	49	72	54	**	**
No data for females		—	—	—	—	—	—	—	—	—
Houston	65	54	76	79	76	41	71	56	60	**
No data for females		—	—	—	—	—	—	—	—	—
Indianapolis	54	65	50	62	**	33	47	61	**	**
No data for females		—	—	—	—	—	—	—	—	—
Kansas City	54	41	66	59	62	**	61	42	**	**
	70	**	67	**	**	**	74	**	**	**
Los Angeles	75	65	74	83	80	72	82	72	74	24
	76	67	75	84	78	69	88	77	59	**
Miami	75	76	78	69	89	68	77	67	77	**
No data for females		—	—	—	—	—	—	—	—	—
New Orleans	70	66	76	78	74	58	73	54	**	**
	55	32	53	65	71	48	54	59	**	**
New York	83	70	87	93	86	74	86	82	81	**
	80	70	80	83	85	77	83	79	74	**
Omaha	56	**	54	73	**	**	59	57	**	**
No data for females		—	—	—	—	—	—	—	—	—
Philadelphia	81	82	83	85	90	59	82	69	87	**
	79	**	76	90	85	68	80	85	**	**
Phoenix	63	74	68	67	67	41	75	60	64	47
	60	57	58	71	69	40	84	60	49	45
Portland	74	75	80	77	78	63	83	70	74	66
	78	69	80	79	88	71	86	75	**	70
St. Louis	56	41	62	70	57	48	55	56	**	**
	44	**	**	**	**	28	56	21	**	**
San Antonio	63	58	73	64	60	58	62	53	68	**
	51	**	**	63	**	36	**	58	38	**
San Diego	82	72	86	86	86	72	85	83	79	**
	79	86	89	78	84	55	89	78	62	**

Source: National Institute of Justice/Drug Use Forecasting Program

* Positive urinalysis, January through December 1988
** Less than 20 cases

Males
Females

Any Drug Use by Male and Female Arrestees 1989*

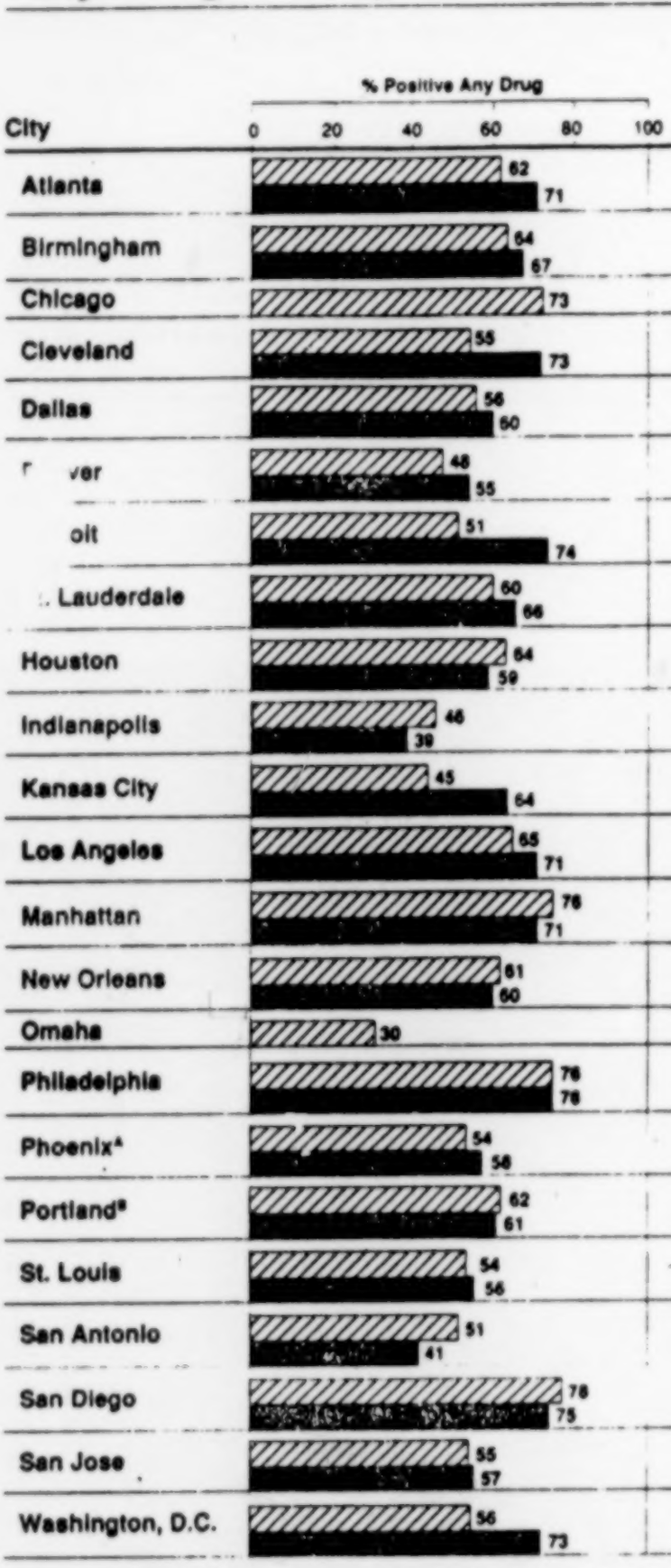


Source: National Institute of Justice/Drug Use Forecasting Program

* Positive urinalysis, January through December 1989

** Less than 20 cases

Any Drug Use by Male and Female Booked Arrestees*



City	% Positive Any Drug	% Positive by Age					% Positive by Race			
		15–20	21–25	26–30	31–35	36+	Black	White	Hispanic	Other
Atlanta	62	32	50	72	79	67	64	44	**	**
	71	**	69	78	87	66	68	85	**	**
Birmingham	64	43	68	70	74	62	65	58	**	**
	67	41	52	80	79	58	67	66	**	**
Chicago	73	55	80	82	80	74	73	63	78	**
Cleveland	55	38	52	70	62	57	58	42	35	**
	73	36	69	78	89	76	80	67	**	**
Dallas	56	40	60	61	69	51	60	52	43	**
	60	51	54	62	72	65	59	64	**	**
[illegible]ver	48	47	50	51	47	42	54	45	46	24
	55	39	61	62	56	47	67	48	44	**
[illegible]oit	51	35	41	57	67	64	51	55	**	**
	74	41	80	78	73	76	74	74	**	**
[illegible]. Lauderdale	60	41	58	67	68	56	69	52	30	**
	66	53	68	71	67	61	71	63	**	**
Houston	64	65	65	73	75	66	71	51	54	**
	59	40	55	67	66	58	62	69	29	**
Indianapolis	46	39	51	51	50	40	51	41	**	**
	39	31	34	43	48	42	47	35	**	**
Kansas City	45	36	38	54	60	41	50	32	**	**
	64	46	69	84	66	39	67	58	**	**
Los Angeles	65	50	59	66	76	70	76	69	53	**
	71	36	68	81	79	76	76	78	56	**
Manhattan	76	52	76	85	83	81	79	75	72	**
	71	41	69	77	78	79	76	72	58	**
New Orleans	61	48	67	71	67	56	62	48	**	**
	60	35	56	68	70	60	61	54	**	**
Omaha	30	24	34	29	32	32	35	28	8	**
Philadelphia	76	65	74	86	84	69	78	66	77	**
	78	51	76	81	87	76	78	72	66	**
Phoenix[A]	54	45	58	56	60	47	67	51	50	31
	58	63	58	56	61	55	71	59	45	39
Portland[B]	62	51	63	67	68	55	63	65	52	36
	61	45	60	70	63	59	62	60	**	**
St. Louis	54	[illegible]	58	69	68	42	55	44	**	**
	56	35	60	72	57	43	57	53	**	**
San Antonio	51	45	53	57	58	46	61	53	47	**
	41	25	38	49	48	43	51	45	37	**
San Diego	78	62	76	86	86	79	82	78	78	**
	75	53	74	74	82	80	84	72	67	**
San Jose	55	54	52	58	66	50	62	55	56	33
	57	36	50	65	67	54	67	54	61	**
Washington, D.C.	56	28	56	68	70	61	57	51	**	**
	73	56	67	76	87	73	75	61	**	**

Source: National Institute of Justice/Drug Use Forecasting Program

Males
Females

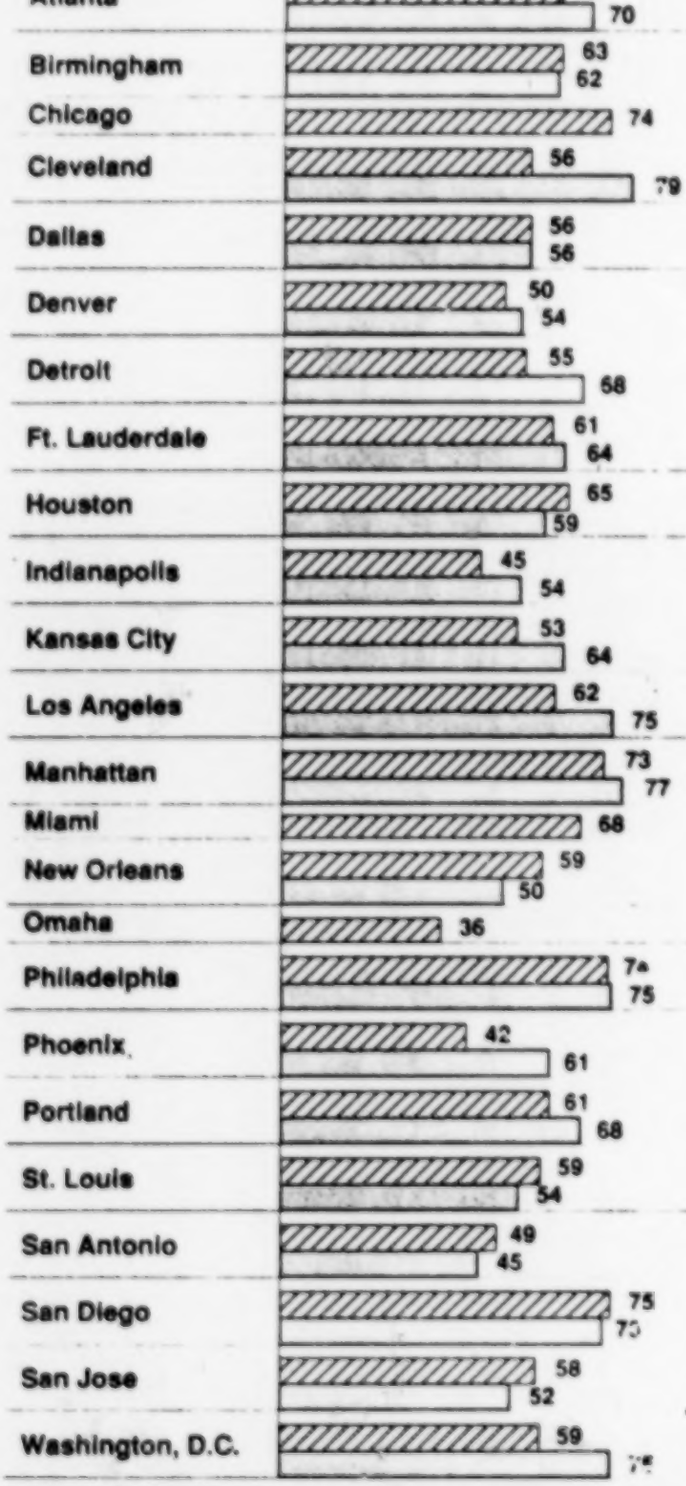
* Positive by urinalysis, January through December 1990

** Less than 20 cases

[A] Site does not test males for methaqualone, barbiturates, and propoxyphene; does not test females for methaqualone and barbiturates

[B] Site does not test for methadone, methaqualone, and propoxyphene

Any Drug Use by Male and Female Booked Arrestees



Site	% Positive by Age					% Positive by Race			
	15–20	21–25	26–30	31–35	36+	Black	White	Hispanic	Other
Atlanta	31	63	74	77	60	65	48	**	**
	40	67	85	79	61	71	66	**	**
Birmingham	42	64	67	75	60	66	55	**	**
	40	54	62	73	63	63	60	**	**
Chicago	62	73	78	84	84	75	72	72	**
Cleveland	43	52	66	62	59	61	41	44	**
	58	74	86	85	82	81	73	**	**
Dallas	34	53	71	66	61	59	55	45	**
	39	43	65	65	64	58	55	46	**
Denver	40	52	56	59	44	61	41	49	25
	40	36	63	69	45	68	45	50	**
Detroit	38	51	64	64	61	56	49	**	**
	29	69	70	73	72	66	76	**	**
Ft. Lauderdale	48	61	67	71	54	71	53	41	**
	47	56	71	76	57	66	61	**	**
Houston	47	66	72	75	61	77	59	41	**
	30	59	68	67	60	65	60	38	**
Indianapolis	36	44	52	51	42	45	44	**	**
	44	44	61	57	60	57	51	**	**
Kansas City	36	54	60	62	49	56	41	**	**
	27	70	77	65	51	67	53	**	**
Los Angeles	43	55	70	68	66	77	65	51	20
	42	64	81	84	76	80	76	63	**
Manhattan	50	75	78	83	73	77	74	68	**
	52	74	81	91	72	75	82	77	**
Miami	50	66	69	80	71	76	57	56	**
New Orleans	43	53	65	73	66	60	51	**	**
	15	44	62	68	51	49	62	**	**
Omaha	42	36	36	37	30	44	32	31	18
Philadelphia	60	73	82	86	66	75	65	76	**
	58	75	79	85	67	76	67	78	**
Phoenix	39	42	41	49	40	53	43	37	19
	53	57	68	69	51	81	59	53	**
Portland	48	60	62	72	58	66	58	73	44
	46	61	63	85	74	73	69	**	**
St. Louis	49	56	73	70	51	60	54	**	**
	39	48	67	54	58	54	54	**	**
San Antonio	35	56	60	53	45	55	48	48	**
	17	47	64	42	59	51	49	42	**
San Diego	61	78	79	80	71	79	74	75	58
	55	63	78	84	70	84	72	69	52
San Jose	38	61	61	67	56	72	59	56	37
	36	49	58	56	50	69	50	48	**
Washington, D.C.	28	50	73	78	65	60	49	**	**
	33	62	85	83	77	75	72	**	**

Source: National Institute of Justice/Drug Use Forecasting Program

Note: Positive by urinalysis, January through December 1991. Drugs tested for include cocaine, opiates, PCP, marijuana, amphetamines, methadone, methaqualone, benzodiazepines, barbiturates, and propoxyphene

** Less than 20 cases.

Males
Females

Drug Use by Charge at Arrest*

Charge	Males		Females	
	Total N	% positive for any drug	Total N	% positive for any drug
Assault	1711	55	422	53
Burglary	1701	75	232	72
Damage/Destroy Property	226	55	44	57
Drug Sale/Possession	2652	83	964	83
Family Offense	425	50	94	51
Flight/Escape/Warrant	488	68	199	72
Fraud/Forgery	415	58	302	55
Homicide	263	57	37	46
Larceny/Theft	2321	71	1200	61
Probation/Parole Violation	481	64	142	64
Prostitution	145	59	700	82
Public Peace/Disturbance	981	58	344	56
Robbery	990	73	107	75
Sex Offenses	418	44	**	--
Stolen Vehicle	1080	64	89	73
Stolen Property	356	70	80	59
Traffic Offense	106	37	316	45
Weapons	675	63	73	62
Other	745	56	437	59
Total	16179	67	5798	66

Source: National Institute of Justice/Drug Use Forecasting Program

* Positive by urinalysis, January through December 1989. Drugs tested for include cocaine, opiates, PCP, marijuana, amphetamines, methadone, methaqualone, benzodiazepine, barbiturates, and propoxyphene

** Less than 20 cases

No. 92-6073

In The

Supreme Court of the United States

February Term, 1993

----------o----------

Richard Lyle Austin,
Petitioner,

vs.

United States,
Respondent,

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PETITIONERS' AMICUS CURIAE BRIEF

----------o----------

GARLAND O. BELL
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QUESTIONS PRESENTED

The decision rendered by the United States District Court of Appeals for the Eighth Circuit is based upon laws that are contradictory to their origin. We desire that the court should consider the following questions pertaining to the Petitioner: Richard Lyle Austin:

A. Whether or not proportionality applies to *in rem* forfeiture?

B. Whether *in rem* forfeiture violates the principles by which our government was established?

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PROVISIONS OF LAW INVOLVED

This case primarily involves the proper application of the provisions of 21 U.S.C. § 881(a)(4), which states, in pertinent part:

> "[a]ll conveyances...which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of illegal drugs" or drug paraphernalia.

and U.S.C. § 881(a)(7), which states, in pertinent part:

> "[a]ll real property ... in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" drug related crimes.

Pertinent provisions of the Constitution and other laws involved in this case are:

1. Amendment IV of the United States Constitution as it applies to the states:

> "The right of the people to be secure in their persons ... against unreasonable ... seizures, shall not be violated..."

2. Amendment VIII of the United States Constitution:

> "...nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

"On June 13, 1990 Keith Engebretson met Austin at Austin's Auto Body shop, went to his mobile home, and then returned to the body shop, at which time he sold Engebretson two grams of cocaine. The next day, state law enforcement officers executed search warrants at the body shop and at the mobile home. The search of the body shop uncovered a twenty-two caliber revolver, some marijuana, and $3,300 in cash. Additionally, a piece of mirror, a small white tube, and a razor blade were found on top of a barrel in the back of the shop. The search of the mobile home revealed an electronic Ohaus scale, a small baggy of cocaine, and $660 in twenty dollar bills. The search also revealed a bindle of cocaine marked '1/2' as well as a baggy of marijuana.

"Austin pleaded guilty in state court to one count of possession of cocaine with intent to distribute. Shortly thereafter, the federal government initiated civil forfeiture proceedings against Austin's body shop and mobile home pursuant to 21 U.S.C. §§ 881(a)(4) and 881(a)(7) (1988). Austin resisted the government's attempt to seize his property. The government moved for summary judgment and supported its motion with an affidavit describing the Engebretson sale, the search of the property, and Austin's subsequent plea and conviction. Austin submitted an

affidavit stating, in relevant part, that the gun found in his body shop was used to shoot sparrows and that he received no money from Engebretson on June 13, 1990. The district court granted the government's motion for summary judgment and this appeal followed" *U.S. v. One Parcel of Property Located at 508 Depot Street, Garreson, Minnehaha County, South Dakota*, 964 F.2d 814 (8th Circ.1992).

In the Federal Eighth Circuit Court of Appeals, the case was decided in favor of the United States. The court ruled as such because it was decided that this case was an *in rem* forfeiture and thus the punishment is not balanced in accordance to the crime. Furthermore, the court cited that "if the Constitution allows *in rem* forfeiture to be visited upon innocent owners...the Constitution hardly requires proportionality review of forfeitures..." The court also urged that this distinction be reviewed due to the ability of the government to take "any property whether it be a hobo's hovel or the Empire State Building." Hence the court decided that the Eighth Amendment does not require that the district court conduct any type of proportionality analysis in a civil forfeiture proceeding.

A.
THE APPELLATE COURT WAS INCORRECT IN HOLDING THAT PROPORTIONALITY OF PUNISHMENT SHOULD NOT BE CONSIDERED IN THE *IN REM* FORFEITURE IN THIS CASE.

I.
Excessive Fines

The Eighth Amendment specifically prohibits the imposition of excessive fines. "The Eighth Amendment proscription of cruel and unusual punishments prohibits sentences that are disproportionate to the crime committed ...The constitutional principle of proportionality has been recognized explicitly in this court for almost a century. In several cases the Court has applied the principle to invalidate criminal sentences." *Solem v. Helm*, 103 S. Ct. 3001 (1983).

Proportionality dates much farther back than our Constitution, however. "Proportionality is deeply rooted in common law jurisprudence. It was expressed in Magna Carta, applied by the English courts for centuries, and repeated in the English Bill of Rights in language that was adopted in the Eighth Amendment. When the Framers of the Eighth Amendment adopted this language, they adopted the principle of proportionality that was implicit in it...Three chapters of Magna Carta were devoted to the rule that 'amercements' may not be excessive." *Solem v. Helm*, 103 S. Ct. 3001 (1983).

II.
Cruel and Unusual Punishment

The Eighth Amendment also prohibits cruel and unusual punishments. We feel that the deprivation of a disproportionate amount of a United States citizen's real property constitutes cruel and unusual punishment. Once Austin returns to mainstream life after a prison sentence, he will be required to find employment and lodging. The lack of these necessities, which were previously possessed by Austin and have been removed by the Eighth Circuit Appellate Court, leaves him little alternative but to reenter into a a profession of criminal activity.

III.
Proportionality *In Rem*

Without doubt the Eighth Amendment was adopted with the intent to place a limit on the "prosecutorial" power of the government. "At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights." *Ingraham v. Wright*, 430 U.S. [651] at 666 [97 S.Ct. 1401, 1409-10, 51 L.Ed.2d 711 (1977] The government is exacting too high a penalty in relation to the crime committed; they are confiscating a person's only means of sustenance for the possession of "a small baggy of cocaine... a bindle of cocaine marked '1/2' as well as a baggy of marijuana" found in the mobile home. This clearly constitutes a severe penalty in relation to the

offense committed yet the government is able to exact such a penalty because of the technical legal distinction regarding *in personam* and *in rem* actions. The Constitution requires proportionality when the government proceeds *in personam* actions, yet it is not required when dealing with *in rem* actions. "Legal niceties such as *in rem* and *in personam* mean little to individuals faced with losing important and/or valuable assets." Because of a legal technicality, the government is able to defy the Eighth Amendment. There is no limit placed on the "prosecutorial" power of the government in this case. "... any property whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction." *United States v. Twelve Thousand, Three Hundred Ninety Dollars*, 956 F.2d 801, 808-09, (8th Cir. 1992). And thus, as a modicum of fairness, the principle of proportionality **should** apply in actions that result in severe or harsh penalties. As stated by the Eighth Circuit of Appeals in *U.S v. One Parcel of Property*, (1992), "We sincerely hope Congress examines § 881 and considers injecting some sort of proportionality requirement into the statute ..."

B.
THE APPELLATE COURT WAS INCORRECT IN HOLDING THAT FORFEITURE WAS APPROPRIATE

The government should not confiscate a person's only means of living; "forfeitures are not favored and should be enforced only when within both letter and spirit

of the law" *U. S. v. One 1976 Buick Skylark, 2 door coupe, Vehicle Identification No. 4W27C6K148647*, 453 F.Supp. 843 (1978). The government has the power to seize any property that is used for storage or transfer of controlled substances regardless of the quantity of the substance found. This allows the government virtually unlimited power. Therefore, allowing the government to interpret *in rem* laws as the unlimited power to confiscate property is a violation of both the purpose of forfeiture laws and the spirit of the United States statute.

The foundation on which the principle of punishment is based is deeply rooted in the fundamental belief of one person's ability to rehabilitate himself after a criminal act. Therefore, it is reasonable to say that any punishment that does not act to rehabilitate the assailant is based on the principle of revenge. In this legal society we must ensure that the punishment will serve to deter any future illicit action. The taking of a home, and a business is not necessary, because the business is the defendant's mean of sustenance, and the mobile home is essentially the only living area belonging to the defendant. The defendant, when released from his prison term, will enter a life without a form of housing as well as a business. This leaves the dealing of drugs as one of his few alternatives. If, however, he has his business and home, he could reenter life and would be wary of dealing drugs because of his previous jail term.

C.
IN REM FORFEITURE,
THE PUNISHMENT OF PROPERTY

In an *in rem* forfeiture, the justification of the seizure is the guilt of the property and not the guilt of the individual. Therefore, provided that illicit activities were performed within the boundaries of the real property, the property is guilty and subject to forfeiture by the government. The financial situation of the person and extent of the crime committed is not weighed in deciding whether the forfeiture is legal. The owner of the real property is not considered in this manner.

It was decided by the Supreme Court of the United States, that a property that was purchased with funds given to the person by Joseph Brenna, who obtained the money "through illegal drug trafficking." It was decided in this case that the person was allowed to keep the property and was not "subject to forfeiture under the Comprehensive Drug Abuse Prevention and Control Act of 1970" *U.S. v. A parcel of land, building, Appurtenances, and Improvements, known as 92 Buena Vista Avenue, Rumson New Jersey*, Daily Appellate Report (2/24/1993). Under this decision the property was not guilty, even though it was purchased with money obtained "through illegal drug trafficking." In this case, obviously by ruling that the defendant was innocent because she had no knowledge of the origin of the monetary sum used to purchase the property, the court had taken into account the innocence of the defendant even though in true *in rem* forfeiture only the guilt of the property should play a deciding factor upon the court's decision. Hence it can be reasonably inferred that *in rem* forfeiture is not in fact dependent upon the guilt of the property, but dependent, to a significant degree, upon the guilt of the individual. *In personam* decisions are subject to proportionality in relation to the crime and the

individual. If indeed *in rem* forfeiture does apply to the individual's guilt, it borders upon those cases involving *in personam* forfeitures, and therefore should be placed under similar jurisdiction. Hence, *in personam* forfeiture should consider the crime involved as well as the individual. Therefore, the Eighth Amendment would apply to *in rem* forfeiture due to its intrusion upon *in personam*.

CONCLUSION

The Eighth Circuit Court of Appeals was required to render a well-reasoned decision on the various issues before it at the time of respondent's appeal. We believe that the Eighth Circuit Court of Appeals made a decision that was in accordance to the precedence set in *in rem* forfeiture. However, we disagree with the current precedences set in *in rem* forfeiture.

The reasoning of the Courts, being based completely on precedence, excludes the basic understanding of principles in which these laws were created. Specifically, these are (i) that the forfeiture of one's home and business is disproportionate to the crime committed, constituting excessive fines, cruel and unusual punishment in violation of the Eighth Amendment, and a misinterpretation of *in rem* forfeiture in this circumstance; (ii) by seizure of Austin's property, (which constitutes his livelihood) a violation of the fundamental foundations of the basis of our legal system has occurred (to deter and rehabilitate past offenders); (iii) the intrusion of *in rem* forfeiture in the jurisdiction of *in personam* forfeiture, thereby, constituting the grounds for proportionality.

DATED: February 26, 1993.

Respectfully submitted,

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